MISSISSIPPI LAW JOURNAL

TRIBUTE TO WILLIAM M. CHAMPION

Sam E. Scott

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TRIBUTE TO WILLIAM M. CHAMPION

Sam E. Scott[*]

Today is a special occasion in the history of the William M. Champion Award. Our colleague, friend and teacher, Bill Champion, is retiring from the faculty of this law school, which he has served with devotion and distinction for more than thirty years. It is fitting and proper that we take a moment to consider his career.

It was thirty-nine years ago when I first met Bill on the steps of what is now Farley Hall as we became first-year law students. Having served his country in the United States Navy, he had just received one of his greatest blessings—a beautiful, charming and talented music teacher from Tupelo, Annette Johnston, who finally had given in, said "yes," and become his new bride. It is really impossible to speak of one Champion without the other. Who and what Annette has been to her family and friends, students, athletes and this University is so widely known that it speaks for itself. For Bill, she has been a rock of strength and a river of love. Their children, John and Laura, both fine lawyers with promising careers, are also great sources of pride for their parents.

Obtaining his law degree here in 1961 with a distinguished record—despite having been my moot court partner through it all—Bill accepted a position with one of the very best law firms in this state. But he loved "the law" too much to practice law, and soon he attained his LL.M. and began his exemplary career at the Ole Miss Law School, becoming affectionately and widely known as "Professor Champion." He has also given legal advice and counsel in important matters, played an active and valuable role in the Mississippi Bar, served as registrar of the law school for many years and finally became acting Dean. From the front steps to the Dean's chair is a long, long way, and not many have made that journey.

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[*] Mr. Scott is currently a partner with McGlinchey Stafford in its Jackson, Mississippi office. These remarks were given at Awards Day at the University of Mississippi School of Law on April 17, 1998.

Someone said, or Bill may have said it himself, that either teaching the Rule Against Perpetuities for twenty-five years or serving as Dean for one year is enough to drive anyone into retirement. He did both, so his retirement is well deserved.

His influence on and inspiration of thousands of students is incalculable. Just as students of my generation remember Dean Farley and Mr. Fox as giants of their legal education, years from now, as other students and faculty members stand here to be recognized and honored, it will often be said, "You know, he (or she) reminds me of Professor Champion." Such is his legacy.

Though he is retiring as a teacher, he will continue what he does best—being a devoted husband, loving father and grandfather, mentor, counselor, story teller, Rebels fan, confidante and trusted friend. He is and ever will be, in the truest sense of the words, "a gentleman and a scholar."

In summary, I can only recite what so many have heard so often from students and others whom his life has touched—again, again and again: "We love Professor Champion."

THE RIGHT TO DIE: DEATH WITH DIGNITY IN AMERICA

David J. Garrow[*]

This article will focus almost exclusively upon the law and the politics of assisted suicide, or "death with dignity," and not upon the medical or religious aspects of the subject. The first thing that has to be emphasized in talking about this subject is that the labels, language and terminology one chooses to use are of the utmost importance. Like many people, I colloquially refer to this subject as "the right to die." In the last two to three years, the most widespread public label for this issue has become "assisted suicide." Among proponents of this issue, any use of the "S" word, as insiders sometimes refer to it, is almost always avoided. The preferred "term of art," if you will, among those proponents is "physician-assisted-dying," which is more substantively meaningful than the somewhat more vague phrases "death with dignity" or "compassion in dying," which are utilized by two of the most important "interest group" organizations.[1] To complete the set of most-commonly used labels, "euthanasia" is a term which virtually all of the public activists in favor of this issue both avoid and reject. Most active participants in this public debate distinguish euthanasia from "assisted suicide" by virtue of the fact that assisted suicide means self-administration of whatever intentionally ends one's life, while "euthanasia" is almost universally understood as actively involving some second party in the final administration of whatever "terminal agent" might be employed to hasten a terminally ill person's death.

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[*] Presidential Distinguished Professor, Emory University School of Law, 1997 to present. B.A. 1975, Wesleyan University; M.A. 1978, Ph.D. 1981, Duke University. This text is a revised and updated transcript of a lecture Professor Garrow delivered at the University of Mississippi on January 26, 1998, under the sponsorship of the University Lecture Series Committee. Emory Law School's superb Assistant Law Librarian for Interlibrary Loan, Will Haines, provided invaluable assistance.

[1] These organizations are the Death With Dignity National Center, Charlotte P. Ross, Executive Director, San Mateo, CA, and the Compassion in Dying Federation, Barbara Coombs Lee, Executive Director, Portland, OR. On the terminology, see generally Leslie Joan Harris, *Semantics and Policy in Physician-Assisted Death: Piercing the Verbal Veil*, 5 ELDER L.J. 251 (1997), and Victor Wooddell and Kalman J. Kaplan, *An Expanded Typology of Suicide, Assisted Suicide, and Euthanasia*, 36 OMEGA 219 (1997-98).

I underscore the importance of these labels and language because whenever you look at any public opinion polling on this set of issues, the numbers vary quite dramatically depending upon precisely what labels and language you choose to employ in asking any particular question. If one speaks of "death with dignity" or "compassion in dying," which are indeed very much *the* favored labels of movement activists, you receive an affirmative public opinion polling endorsement from average Americans that can range as high as even seventy or seventy-five percent.[2] However, at the opposite extreme, if any form of the "S" word, suicide, or the verb "kill" is employed, the percentage of affirmative responses generally declines by a good fifteen to twenty percent, depending upon the particular question involved.[3]

The crux of this issue politically—and to my mind this is perhaps the number one fact for anyone to appreciate concerning how this political debate is going to develop and evolve in the future—is that there is a tremendous divergence between popular opinion about what should be available for terminally ill patients and what "elite" opinion, especially within both the medical profession and among legislators and other elected officials, presently is willing to publicly or explicitly support.

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[2] *See* Jane Meredith Adams, *Assisted Suicide Gains in Propriety*, BOSTON GLOBE, Nov. 9, 1997, at D3; William Claiborne, *Doctor-Aided Suicide is Backed in Poll*, WASH. POST, July 30, 1998, at A3; *see also* Robert J. Blendon et al., *Should Physicians Aid Their Patients in Dying? The Public Perspective*, 267 JAMA 2658 (1992); Peter A. Singer et al., *Public Opinion Regarding End-of-Life Decisions*, 41 SOC. SCI. & MED. 1517 (1995); Gary Liebow, *Poll Finds Tentative, Conditional Support for Assisted Suicide*, HARTFORD COURANT, Apr. 12, 1998, at B5.

[3] Claiborne, *supra* note 2, at A3.

While in most public opinion polling, one can get affirmative endorsements of physician-assisted-dying that go as high as seventy-five percent, at the same present point in time, any small lecture hall with about one hundred seats would be more than sufficient to accommodate every state legislator or state elected official from anywhere in America who is willing to publicly endorse liberalization or reform in this area. The fact that this divergence between public opinion and elite opinion is so great, something on the scale of sixty-five or seventy percent popular versus perhaps five to ten percent elected or elite, is an inescapable guarantee that this issue (a) will not go away in the decade or two ahead, and (b) will almost certainly expand and explode as a subject of increased public and political debate.

Over the past seven or eight years, this issue has evolved in terms of both law and politics. The legal debate in some ways culminated in June 1997, with two United States Supreme Court decisions—one from Washington state[4] and the other from New York[5]—that were brought forward by the small network of activists centered around Compassion in Dying. The political aspect, however, is in many ways probably more important for the future. Particularly momentous have been developments in the state of Oregon. In November 1997, by the overwhelming margin of sixty to forty percent, Oregon voters reaffirmed the legalization of physician-assisted-dying for terminally ill patients that voters had first enacted in 1994 by the much narrower margin of fifty-one to forty-nine percent.[6] That popular vote tally, coming after two intensely competitive and heavily-publicized statewide campaigns within three years, not only legalized physician-assisted-dying for terminally ill Oregonians, but also represented far and away the most momentous political development on the issue to date.[7] Oregon already is becoming both the medical and the political laboratory for how this issue is going to play out for the rest of America in the years ahead. To date, Oregon's track record of quiet and low-key professional success has given "death with dignity" proponents a further boost over and above their November 1997 political triumph.[8]

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[4] Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

[5] Vacco v. Quill, 521 U.S. 793 (1997).

[6] *See* Gail Kinsey Hill, *Suicide Law Stands*, PORTLAND OREGONIAN, Nov. 5, 1997, at A1.

[7] See David J. Garrow, *A New View of Death*, PORTLAND OREGONIAN, Nov. 6,

Discussions concerning how to legally permit hastened deaths for the terminally ill go back a good sixty years in this country. In the early years, those discussions were almost exclusively limited to small and publicly invisible elite groups, such as the Euthanasia Society of America, founded in 1938.[9] Any wider public perception or appreciation of the issue dates largely from the Karen Ann Quinlan case in New Jersey in the mid and late 1970s,[10] and then, a few years later, from the early activities of the Hemlock Society, founded in 1980 by a former English journalist named Derek Humphry.[11] The subsequent Missouri case involving Nancy Cruzan,[12] which

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1997, at D11, and David J. Garrow, *The Oregon Trail*, N.Y. TIMES, Nov. 6, 1997, at 31 for a discussion of the Oregon vote's significance. *See also* William Claiborne & Thomas B. Edsall, *Affirmation of Oregon Suicide Law May Spur Movement*, WASH. POST, Nov. 6, 1997, at A19.

[8] William Claiborne, *In Oregon, Suicide Option Brings a Kinder Care*, WASH. POST, Apr. 29, 1998, at A1; V. Dion Haynes, *Suicide Law Improving Doctor-Patient Relationship*, CHI. TRIB., June 6, 1998, at 1; Erin Hoover Barnett, *10 Get Drugs Under Oregon Suicide Law*, PORTLAND OREGONIAN, Aug. 19, 1998, at A1; Sam Howe Verhovek, *Legal Suicide Has Killed 8, Oregon Says*, N.Y. TIMES, Aug. 19, 1998, at A16.

[9] *See* PETER G. FILENE, IN THE ARMS OF OTHERS: A CULTURAL HISTORY OF THE RIGHT-TO-DIE IN AMERICA 5-10 (1998); *see also* Stephen L. Kuepper, *Euthanasia in America, 1890-1960: The Controversy, the Movement, and the Law* (1981) (unpublished Ph.D. Dissertation, Rutgers U.); CHARLES F. MCKHANN, A TIME TO DIE: THE PLACE FOR PHYSICIAN ASSISTANCE (1999).

[10] *See* FILENE, *supra* note 9, at 11-46, 76-95, 125-133, 161-164; *see also Matter of Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom.*, Garger v. New Jersey, 429 U.S. 922 (1976).

[11] *See* DONALD W. COX, HEMLOCK'S CUP: THE STRUGGLE FOR DEATH WITH DIGNITY 44-55 (1993); JAMES M. HOEFLER, DEATHRIGHT: CULTURE, MEDICINE, POLITICS, AND THE RIGHT TO DIE 139-40 (1994); DEREK HUMPHRY & MARY CLEMENT, FREEDOM TO DIE: PEOPLE, POLITICS AND THE RIGHT-TO-DIE MOVEMENT 100-16 (1998); *see also* DEREK HUMPHRY, JEAN'S WAY (1978); DEREK HUMPHRY, LET ME DIE BEFORE I WAKE: HEMLOCK'S BOOK OF SELF-DELIVERANCE FOR THE DYING (1984).

[12] Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

went to the United States Supreme Court,[13] and the publication of Humphry's how-to-do-it book, *Final Exit*, a run-away best-seller in the early 1990s, gave the issue far greater visibility.[14]

The Hemlock Society may remain for many people the most identifiable organization involved in this issue, but Hemlock's importance today, and for the past six or seven years, has become quite modest relative to the roles being played by Compassion in Dying and the Oregon activists, who engineered both the 1994 electoral victory and the 1997 reendorsement.[15] Many of the Oregon and Washington state activists are themselves Hemlock "alumni," but the beginnings of their shift towards greater political activism began in 1990-1991 when several Hemlock activists in the Seattle area, including Unitarian minister Ralph Mero, decided to pursue a statewide popular vote on an initiative measure[16] which would legalize physician-assisted-dying.

The precise goal the Washington state right-to-die activists hoped to attain through a popular vote victory was to allow for physician prescription of a sufficiently powerful dose of a lethal drug so that terminally ill patients who wanted to end their lives could self-administer the necessary prescription. But in November 1991, the Washington initiative effort was defeated by a margin of fifty-four to forty-six percent, in large part due to the energetic and well-funded opposition campaign mounted by organizations affiliated with the Roman Catholic Church.[17] That Washington state defeat was mirrored exactly one year later when a second very similar measure was defeated in California in November 1992 by an identical fifty-four to forty-six percent tally.[18]

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[13] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990). *See also* FILENE, *supra* note 9, at 168-83.

[14] DEREK HUMPHRY, FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING (1991). *See also* COX, *supra* note 11, at 27-43.

[15] On new 1998-99 efforts by the Hemlock Society to extend its own patient-outreach efforts in a manner quite similar to those pioneered by Compassion in Dying, see Diane C. Lade, *Helping Death: In Florida and Other States Where Physician-Assisted Suicide Has Little or No Political Support, the Hemlock Society and Others Are Stepping In*, FT. LAUDERDALE SUN-SENTINEL, Feb. 21, 1999, at G1.

[16] *See* Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM. 799, 817-21 (1995); Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247 (1996/97). Regarding how initiative and referenda procedures are disproportionately present in western states, see Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997).

In the wake of the Washington state defeat, Ralph Mero took the lead in establishing an organization which in many respects was very much like the early "clergy consultation services" that played a leading role in helping to provide medically safe abortion services in the pre-1970 era, when abortion was still illegal. During the years 1967-1970, a large number of liberal clergy offered women with unwanted pregnancies face-to-face individual counseling and private medical referrals to cooperative physicians who could provide safe, if nonetheless illegal, abortions.[19] Similarly, Ralph Mero's idea was to essentially ignore the fact that Washington state still formally prohibited assisted suicide or aid-in-dying. Mero's view was that even though the law against assisted suicide was still on the books, private one-on-one counseling no doubt could probably take place without prosecutors actually pursuing or investigating the people involved.[20] When Mero publicly announced that he and others were going to begin offering this sort of direct person-to-person assistance under the new organizational rubric of "Compassion in Dying,"[21] a young Seattle lawyer named Kathryn Tucker read one of the resulting newspaper stories and was stimulated to telephone Mero. Tucker suggested that if Mero's group was going to expose itself to potential prosecution, would it not be better to go ahead and challenge the constitutionality of Washington state's anti-assisted suicide statute rather than simply remain vulnerable to a potential prosecutorial inquiry?

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[17] *See* Warren King, *Decisive Loss for "Aid in Dying,"* SEATTLE TIMES, Nov. 6, 1991, at D1.

[18] George de Lama, *States Take Pulse on Morality*, CHI. TRIB., Nov. 5, 1992, at A7; Virginia Ellis & Paul Jacobs, *California Elections*, L.A. TIMES, Nov. 5, 1992, at A3.

[19] *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 318, 333-34, 345-51 (1994); *see also* ARLENE CARMEN & HOWARD MOODY, ABORTION COUNSELING AND SOCIAL CHANGE 23-31 (1973).

[20] On Mero, see Ralph Kastenbaum, *Ralph Mero: An Omega Interview*, 29 OMEGA 1 (1994); Thomas A. Preston & Ralph Mero, *Observations Concerning Terminally Ill Patients Who Choose Suicide*, *in* DRUG USE IN ASSISTED SUICIDE AND EUTHANASIA (Margaret P. Battin & Arthur G. Lipman, eds. 1996), at 183-92. *See also* Lisa Belkin, *There's No Simple Suicide*, N.Y. TIMES MAG., Nov. 14, 1993, at 48-55, 63, 74-75.

Thus at the same time that this small group of activists in Seattle began offering one-on-one counseling to terminally ill patients who were interested in considering the possibility of hastened death, Kathryn Tucker began preparing a constitutional challenge against the Washington state assisted suicide statute which she filed in federal district court. It took a year for that case to come to its initial fruition, but in May 1994, Tucker, Mero, and Compassion in Dying won a quietly dramatic victory when Federal District Judge Barbara Rothstein ruled that, in light of the constitutional protection afforded to basic personal liberty choices pursuant to the landmark Supreme Court abortion decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[22] there necessarily was constitutional protection for choice at the end of life for terminally ill people as well.[23]

Legally and analytically, Judge Rothstein's ruling was a major breakthrough with regard to the question of whether the constitutional "liberty" analysis that had developed in abortion cases as far back as *Roe v. Wade*[24] and *Doe v. Bolton*[25] (and before that, in the famous birth control case of

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[21] *See* Warren King, *Group Forms to Help the Dying Commit Suicide*, SEATTLE TIMES, May 4, 1993, at D1.

[22] 505 U.S. 833 (1992).

[23] Compassion in Dying v. State of Washington, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994). *See* Kathryn L. Tucker & David J. Burman, *Physician Aid in Dying: A Humane Option, A Constitutionally Protected Choice*, 18 SEATTLE U. L. REV. 495 (1995).

[24] 410 U.S. 113 (1973).

[25] 410 U.S. 179 (1973).

Griswold v. Connecticut[26]), was potentially "portable" to cases challenging state restrictions on personal choice and liberty at the end of life.[27] That the constitutional liberty analysis that had been developed in abortion cases over the preceding twenty years was now applicable or "portable" to end of life choice was an exciting potential breakthrough. However, one year later, in the spring of 1995, when Washington state's appeal of Judge Rothstein's ruling was considered by a three-judge panel of the United States Circuit Court of Appeals for the Ninth Circuit, her holding was brusquely reversed.[28] The entire court of appeals agreed to reconsider that reversal,[29] and then in the spring of 1996, by an eight to three majority, the en banc appellate panel reendorsed and reinstated the affirmative constitutional ruling first made by Judge Rothstein.[30]

Just four weeks after that encouraging turn of events, the United States Court of Appeals for the Second Circuit ruled in a second, very similar parallel case which Kathryn Tucker (with the assistance of her father's law firm, Hughes Hubbard and Reed)[31] had filed against New York state's anti-assistance statute on behalf of several physicians. That challenge initially had been dismissed by a federal trial judge,[32] but the appellate panel's reversal gave Tucker her second major constitutional triumph in less than a month.[33]

Those two back-to-back federal appellate court victories generated a tremendous amount of journalistic curiosity as to whether the Supreme Court would review, and either endorse or reject, the extension of the abortion-based liberty analysis to end-of-life choice for the terminally ill.[34] Similarly, once the Court announced in October 1996 that it *would* review both cases[35] and scheduled argument for January 1997, there was a tremendous increase in the amount of news coverage devoted to end-of-life care and end-of-life decision-making. Prior to these two cases, there had been a very active, visible debate about these issues in medical journals, and particularly in the *New England Journal of Medicine*. However, it was very much a debate and discussion within a fairly limited network of medical professionals and ethicists, which in some part had grown out of a 1991 article in the *New England Journal* by Dr. Timothy Quill of Rochester, New York (who later became Kathryn Tucker's lead plaintiff in the New York test case), detailing how he had aided a patient in hastening her death in 1990.[36]

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[26] 381 U.S. 479 (1965).

[27] *See* Brian C. Goebel, *Who Decides if There is "Triumph in the Ultimate Agony"?: Constitutional Theory and the Emerging Right to Die With Dignity*, 37 WM. & MARY L. REV. 827, 843-44, 853, 871-72 (1996).

[28] Compassion in Dying v. State of Washington, 49 F.3d 586, 588 (9th Cir. 1995).

[29] Compassion in Dying v. State of Washington, 62 F.3d 299, 299 (9th Cir. 1995).

[30] Compassion in Dying v. State of Washington, 79 F.3d 790, 798, 838 (9th Cir. 1996).

[31] *See* David J. Garrow, *Nine Justices and a Funeral*, GEORGE, June 1997, at 56.

[32] Quill v. Koppell, 870 F. Supp. 78, 79 (S.D.N.Y. 1994).

[33] Quill v. Vacco, 80 F.3d 716, 718 (2d Cir. 1996).

Once the day of the Supreme Court arguments in the two cases actually arrived (January 8, 1997), it became almost immediately apparent, within literally the first fifteen or twenty minutes, to virtually everyone of us who was watching the exchanges between the attorneys and the justices in the courtroom that morning, that the nine justices, perhaps even unanimously, had absolutely no appetite or interest whatsoever in extending the liberty analysis of the abortion cases to end-of-life decision-making.[37] Indeed, the justices were quite aggressive in reminding Kathryn Tucker that the one previous Supreme Court ruling on this subject, the 1990 *Cruzan* case,[38] did not even begin to reach as far as Tucker and a number of the other activists had somewhat optimistically thought it might.[39] After the barrage of less-than-receptive questions with which the justices greeted Tucker, the argument of the New York case underscored the degree to which there was little or no mystery to the negative outcome that would be ratified when the Court publicly issued its decisions several months later.

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[34] *See, e.g.*, David J. Garrow, *The Justices' Life-or-Death Choices*, N.Y. TIMES, Apr. 7, 1996, §§ 4, 6.

[35] Vacco v. Quill, 518 U.S. 1055 (1996); Washington v. Glucksberg, 518 U.S. 1057 (1996); Linda Greenhouse, *High Court to Decide if the Dying Have a Right to Assisted Suicide*, N.Y. TIMES, Oct. 2 1996, at A1.

[36] *See* Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision-Making*, 324 N. ENG. J. MED. 691 (1991); Lawrence K. Altman, *Doctor Says He Gave Patient Drug to Help Her Commit Suicide*, N.Y. TIMES, Mar. 7, 1991, at A1; Tim Friend, *When Death Is Patient's Preference*, USA TODAY, Mar. 12, 1991, at D1; Diane M. Gianelli, *N.Y. Case Reopens Debate on Doctor-Assisted Suicide*, AM. MED. NEWS, Mar. 25, 1991, at 1; *see also* TIMOTHY E. QUILL, DEATH AND DIGNITY: MAKING CHOICES AND TAKING CHARGE (1993); TIMOTHY E. QUILL, A MIDWIFE THROUGH THE DYING PROCESS: STORIES OF HEALING AND HARD CHOICES AT THE END OF LIFE (1996).

[37] *See* Garrow, *supra* note 31, at 57, 59.

When those two ostensibly unanimous, nine-to-nothing rulings were handed down on June 29, 1997, the ensuing media coverage generally conveyed the apparent news that there was no federal constitutional right to physician-hastened death for terminally ill patients.[40] While of course it was numerically correct that both of Kathryn Tucker's appellate court victories had indeed been reversed by nine-to-nothing margins, the banner headlines were nonetheless somewhat misleading, in that five of the nine justices—Justices Stevens, Breyer, Souter, O'Connor and Ginsburg—had also made it either explicitly or implicitly clear, in different separate or concurring opinions,[41] that they were not in any way closing off two different issues for the future.

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[38] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).

[39] After Tucker stated that with regard to the prospective removal of a comatose patient's feeding tube, the *Cruzan* Court "found that to be a very significant liberty interest," Justice Anthony M. Kennedy declared that "I disagree with that characterization. I think the Court was very, very careful to assume a liberty interest." Tucker agreed, but Kennedy emphasized, "That's a rather critical point, is it not?" Transcript of Oral Argument at 45, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110).

[40] *See, e.g.,* Lyle Denniston, *No Right to Assisted Suicide; Supreme Court Is Unanimous in Historic Ruling,* BALTIMORE SUN, June 27, 1997, at A1; Muriel Dobbin, *Justices Find No Right to Doctor-Assisted Suicide,* NEWS AND OBSERVER (Raleigh), June 27, 1997, at A1; Thomas Maier, *Supreme Court Sees No Right to MD-Aided Suicide,* NEWSDAY, June 27, 1997, at A3; Basil Talbott, *No Right to Suicide Help; Supreme Court Upholds State Bans,* CHI. SUN-TIMES, June 27, 1997, at 1; Sharon Voas, *Justices Rule No Right to Die,* PITTSBURGH POST-GAZETTE, June 27, 1997, at A1; *No 'Right to Die' for Terminally Ill in Constitution,* PORTLAND (Maine) PRESS HERALD, June 27, 1997, at A1.

[41] Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (Souter, J., concurring in the judgment); 2303 (O'Connor, J., concurring); 2304 (Stevens, J., concurring in

First, those five justices made it quite visibly clear that even though there was no constitutionally protected "right to assisted suicide," there might very well be a constitutionally protected interest in adequate pain control for terminally ill patients at the end of life.[42] In other words, the Court appeared to be saying that no dying American should be forced by any state laws to endure a death that encompasses potentially controllable or sedatable pain.

Secondly, those same five justices appeared also to be saying that the door to the basic underlying constitutional question about physician-hastened death for the terminally ill was still in some ways open for the future.[43] Indeed, since those two decisions were handed down, a striking consensus, particularly within the medical community, has emerged

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the judgments); 2310 (Breyer & Ginsberg, J.J., concurring in the judgments).

[42] *Glucksberg,* 117 S. Ct. at 2290-93 (Souter, J., concurring in the judgment); 2303 (O'Connor, J., concurring); 2307 (Stevens, J., concurring in the judgments) (stating that "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life'") (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)); 2312 (Breyer, J., concurring in the judgments) (stating that "[w]ere the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases").

[43] *See* David J. Garrow, *Letting the Public Decide About Assisted Suicide*, N.Y. TIMES, June, 29, 1997, § 4, at 4; Ronald Dworkin, *Assisted Suicide: What the Court Really Said,* N.Y. REV. OF BOOKS, Sept. 25, 1997, at 40; *see also* John A. Robertson, *Respect for Life in Bioethical Dilemmas: The Case of Physician-Assisted Suicide*, 45 CLEVELAND ST. L. REV. 329, 338-42 (1997); Adam J. Cohen, *The Open Door: Will the Right to Die Survive* Washington v. Glucksberg *and* Vacco v. Quill, 16 IN THE PUBLIC INTEREST 79 (1997-98); Robert M. Hardaway et al., *The Right to Die and the Ninth Amendment: Compassion and Dying After* Glucksberg *and* Vacco, 7 GEO. MASON L. REV. 313 (1999). *But see* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997); Yale Kamisar, *On the Meaning and Impact of the Physician Assisted Suicide Cases*, 82 MINN. L. REV. 895 (1998); Yale Kamisar, *Physician-Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121 (1998).

among people who had been on opposing sides when the cases themselves were being litigated.[44] At the core of this newly-emerging consensus are the medical underpinnings of what often is called the "principle of the double effect," a concept which originally grew out of Roman Catholic theology, but which now is also widely accepted within the medical profession. The crux of that principle is that if a physician's primary intent in administering morphine or any other heavy-duty pain control medication at the end of life is to alleviate the patient's suffering, then the attendant fact that that pain control medication may also additionally and secondarily have the further effect of hastening the terminally ill patient's death is wholly acceptable. So long as that hastened death is not the physician's primary intent, it is not—pursuant to this almost universally accepted "double effect" principle—a violation of any existing anti-assisted suicide statute. To many people this may very well sound like a rather obscure and extremely fine distinction, but many if not most medical professionals appear to accept that this principle embodies an acceptable distinction rather than an inescapable contradiction.[45]

Closely related to the "double effect" distinction is a second concept—labeled "terminal sedation"—which again is much more widely employed within the medical profession than by most of us on the outside. That concept speaks to a circumstance where heavy-duty medication is administered to minimize the pronounced physical discomforts—such as agitated delirium or intolerable shortness of breath—of an unconscious, terminally ill patient near the end of life. Given what was stated and suggested by the five justices in June 1997, both the medical profession and many legal observers have concluded that both a very expansive application of the "double effect" principle and a very aggressive approach to terminal sedation (or what nowadays sometimes is being called "palliative sedation") have received a clear, if nonetheless indirect, blessing from a majority of the Court. That piecemeal majority clearly suggested that access to extremely aggressive pain control which would mitigate unnecessary suffering at the end of life is indeed a constitutionally protected liberty interest, even if that treatment also nonetheless hastens the terminally ill patient's death. The crucial if ineffable requirement here is one of intent: Is indeed the primary intent to alleviate pain and suffering rather than to "merely" hasten death? As thus understood, the apparently "small" opening provided by the "double effect" principle can in practice be so significantly enlarged as to provide a major step toward "assisted suicide" in some—though far from all—cases where terminally ill patients do seek to hasten their own deaths.[46]

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[44] *See* Robert A. Burt, *The Supreme Court Speaks—Not Assisted Suicide But A Constitutional Right to Palliative Care*, 337 NEW ENG. J. MED. 1234 (1997); *see also* Robert A. Burt, *Disorder in the Court: Physician-Assisted Suicide and the Constitution*, 82 MINN. L. REV. 965 (1998); Timothy E. Quill et al., *The Debate Over Physician-Assisted Suicide: Empirical Data and Convergent Views*, 128 ANNALS OF INTERNAL MED. 552 (1998).

[45] *See* Timothy E. Quill et al., *The Rule of Double Effect—A Critique of Its Role in End-of-Life Decision Making*, 337 N. ENG. J. MED. 1768 (1997).

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[46] *See* David Orentlicher, *The Supreme Court and Physician-Assisted Suicide: Rejecting Assisted Suicide But Embracing Euthanasia*, 337 NEW ENG. J. MED. 1236 (1997); David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 HASTINGS CONST. L.Q. 947, 954-960 (1997); Timothy E. Quill et al., *Palliative Options of Last Resort: A Comparison of Voluntarily Stopping Eating and Drinking, Terminal Sedation, Physician-Assisted Suicide, and Voluntary Active Euthanasia*, 278 JAMA 2099 (1997); Thomas A. Preston, *The Case for Privacy in Dying: A Solution from the Supreme Court*, 76 KING COUNTY MED. SOC'Y BULL. Nov. 1997, at 9; Carol M. Ostrom, *What If Medications Used for Pain Control Speed Patients' Death?*, SEATTLE TIMES, Jan. 14, 1998, at A1; *see also* Howard Brody, *Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect, and Clinical Practice*, 82 MINN. L. REV. 939 (1998); Diane E. Meier et al., *A National Survey of Physician Assisted Suicide and Euthanasia in the United States*, 338 NEW ENG. J. MED. 1193 (1998); Timothy E. Quill, *Physician-Assisted Death: After the U.S. Supreme Court Ruling*, 75 U. DET. MERCY L. REV. 481 (1998).

Orentlicher correctly observes that in cases of terminal sedation where the comatose terminally ill patient is not conscious, the decision to administer aggressive pain control under the rubric of the "double effect" principle is a decision made by a physician, perhaps in consultation with the patient's family, rather than by the patient. *See* Orentlicher, *The Supreme Court and Physician-Assisted Suicide*, *supra*; Orentlicher, *The Supreme Court and Terminal Sedation*, *supra*. Orentlicher thus contends that terminal sedation is in effect euthanasia, and that it is far less ethically defensible than self-administered assisted suicide where, as

In addition to this medico-legal evolution which has been taking place since the summer of 1997, the other equally important development has been the political evolution of this issue in the state of Oregon. In November 1994, three years after the popular vote defeat in Washington state, and two years after the popular vote loss in California, Oregon voters, by a very narrow margin of fifty-one to forty-nine percent, passed "The Oregon Death With Dignity Act."[47] The Act authorized physicians to provide lethal prescriptions to terminally ill patients who had initiated and completed a complicated, multi-stage approval process requiring confirmation of a late-stage terminal illness and successive, independently-witnessed requests for physician-assisted-dying.[48]

Soon after the voters of Oregon approved that statute in November 1994, the National Right to Life Committee (NRLC), which also functions as America's primary anti-abortion litigation group, filed suit in the carefully chosen venue of Eugene, Oregon—where only a single, predictably conservative federal district judge had chambers—seeking a temporary restraining order to preclude the measure from taking effect. Just as the NRLC attorneys had hoped, on December 7, 1994, Judge Michael R. Hogan issued such an order, followed three weeks later by a preliminary injunction[49] and eight months later by a permanent injunction, thereby preventing the voter-approved initiative from becoming effective.[50] Only in late February 1997, more than two years after Judge Hogan had first placed the Oregon measure in legal limbo, did a three-

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in Oregon, the physician simply provides the terminally ill patient with a prescription for a legal dose of medication which the patient, in the end, may or may not choose to utilize. *See* Orentlicher, *The Supreme Court and Physician-Assisted Suicide, supra*; Orentlicher, *The Supreme Court and Terminal Sedation, supra*; *see also* David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B.C. L. REV. 443 (1997).

[47] OR. REV. STAT. §§ 127.800 to 127.897 (1998).

[48] *Id.*

[49] Lee v. State of Oregon, 869 F. Supp. 1491 (D.Or. 1994).

[50] Lee v. State of Oregon, 891 F. Supp. 1421, 1429, 1439 (D.Or. 1995). *See also* Michael A. Cohen, *Plaintiffs' Standing in* Lee v. Oregon*: The Judicially Assisted Demise of the Oregon Death With Dignity Act*, 74 ORE. L. REV. 741 (1995).

judge panel of the United States Court of Appeals for the Ninth Circuit reverse Hogan's rulings and hold that the National Right to Life Committee's plaintiffs had no standing to mount any federal court challenge to the Oregon Death With Dignity Act.[51]

Once that appeals court ruling was handed down, Roman Catholic and right to life forces in Oregon realized that the legal clock was once again ticking, and that the Oregon Death With Dignity Act would in all great likelihood go into effect as soon as the Supreme Court declined to hear the National Right to Life Committee's appeal of the Ninth Circuit's decision.[52] Thus, in the early spring of 1997, conservative Roman Catholic allies in the Oregon legislature mobilized in order to place the "Death With Dignity Act," which had been approved by voters two and a half years earlier, back on the ballot for another state-wide vote that coming fall. That action marked the first time that Oregon voters had been forced to reconsider an initiative affirmation in almost ninety years; the last time that occurred was in 1908 after voters had enacted a statute prohibiting legislators from accepting free train tickets from railroads.[53]

Once the Legislature put the issue back on the ballot for a November re-vote, two developments ensued. First, Roman Catholic and right to life groups from all across the nation began to pump large amounts of money into the Oregon campaign in the "finger in the dike" belief that if they again lost and the Oregon measure took effect, the door could well be opened to the adoption of similar new laws in other states as well. Second, the Roman Catholic groups, apparently as a result of their own public opinion polling in Oregon, decided that they would be better off not to contest the election on the abstract or philosophical issue of individual choice at the end of life, but instead to contest it on the much narrower issue of whether lethal prescriptions actually would result in peaceful and relatively quick deaths for those terminally ill patients who chose hastened dying. Thus, the 1997 Oregon political campaign, rather than focusing on moral issues about choice at the end of life, instead devolved almost completely into an argument about the dependability or undependability of lethal doses of medication, with some Roman Catholic-sponsored television ads featuring nightmarish warnings about patients choking on their own vomit.[54]

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[51] Lee v. State of Oregon, 107 F.3d 1382 (9th Cir. 1997), *cert. denied*, Lee v. Harcleroad, 118 S. Ct. 328 (1997). *See also* Amy Goldstein, *"Pro-Life" Activists Take on Death*, WASH. POST, Nov. 10, 1998, at A1.

[52] That refusal to review the Ninth Circuit's decision came in mid-October. *See* Lee v. Harcleroad, 118 S. Ct. 328 (1997); *see also* Linda Greenhouse, *Assisted Suicide Clears A Hurdle in Highest Court*, N.Y. TIMES, Oct. 15, 1997, at A1.

[53] Mark O'Keefe, *House Approves Asking for Repeal of Suicide Law*, PORTLAND OREGONIAN, May 14, 1997, at A1; *see also* Hamilton v. Myers, 943 P.2d 214 (Or. 1997); David Smigelski, *To Lie For*, WILLAMETTE WEEK, Sept. 17, 1997, at 22. Opponents had to press for another statewide vote, a move not subject to gubernatorial veto, rather than simple repeal, which Oregon Governor John Kitzhaber could have vetoed. *See* Ashbel S. Green, *Suicide Law Returns to Voters*, PORTLAND OREGONIAN, June 10, 1997, at A1.

When the Oregon re-vote took place on November 4, 1997, the pro-physician-assisted-dying forces triumphed not by the previous narrow margin of fifty-one to forty-nine, but by the almost landslide margin of sixty to forty percent. That sizable margin was the result not only of voters' preference for individual choice at the end of life, but also a reaction against the Oregon Legislature's placing back on the ballot a measure which the electorate already had approved just three years earlier.[55] The Oregon measure thus finally took effect in November 1997.[56]

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[54] *See* Gail Kinsey Hill, *Oregon Could Set Course on Suicide Debate in U.S.*, PORTLAND OREGONIAN, Sept. 25, 1997, at A1; Mark O'Keefe, *Question of Drugs' Effectiveness is Divisive*, PORTLAND OREGONIAN, Oct. 5, 1997, at A1; Gail Kinsey Hill, *Millions Raised for Measure 51*, PORTLAND OREGONIAN, Oct. 7, 1997, at A1; Gail Kinsey Hill, *TV Ads Supporting Measure 51 Criticized*, PORTLAND OREGONIAN, Oct. 8, 1997, at A1; Gail Kinsey Hill, *More Stations Reject Measure 51 Ad*, PORTLAND OREGONIAN, Oct. 9, 1997, at D6; Timothy Egan, *Assisted Suicide Comes Full Circle to Oregon*, N.Y. TIMES, Oct. 26, 1997, at 1; Lynda Gorov, *Campaign to Repeal Assisted Suicide Law Rivets Oregon Voters*, BOSTON GLOBE, Oct. 27, 1997, at A1; John Ritter, *Right-to-Die Initiative Bitterly Contested in Ore.*, USA TODAY, Oct. 29, 1997, at A6; William Claiborne, *A Harsh Look at Assisted Suicide*, WASH. POST, Nov. 1, 1997, at A1; Gail Kinsey Hill, *Messages Same as Vote Nears End*, PORTLAND OREGONIAN, Nov. 3, 1997, at A1; Jeff Mapes, *Measure 51 Gathered Late Cash Infusion*, PORTLAND OREGONIAN, Dec. 5, 1997, at B1.

[55] Timothy Egan, *In Oregon, Opening a New Front in the World of Medicine*,

After having been in effect for over a year now,[57] three clear lessons appear to have emerged from the statute's existence. First, relatively few Oregonians, rather than some huge number of the terminally ill, have actually gone through the entire approval process and made use of the Death With Dignity Act.[58] Second, all of those citizens who have both ob-

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N.Y. TIMES, Nov. 6, 1997, at A26.

[56] The Ninth Circuit officially issued its mandate lifting Judge Hogan's injunction on October 27, 1997, but no one in Oregon took note of this fact until the very day of the re-vote, November 4. *See* Mark O'Keefe & Ashbel S. Green, *Court Lifts Injunction, Suicide Law In Effect,* PORTLAND OREGONIAN, Nov. 5, 1997, at A1. Judge Hogan finally dismissed the case only ten months later. *See* Ashbel S. Green, *Challenge to Suicide Law Is Dismissed,* PORTLAND OREGONIAN, Sept. 23, 1998, at A1.

[57] Opponents' efforts to further obstruct implementation of the Oregon law by persuading the federal Drug Enforcement Administration (DEA) to impose sanctions on physicians who wrote patient prescriptions pursuant to the Death With Dignity Act were turned aside by United States Attorney General Janet Reno. *See* Neil A. Lewis, *Reno Lifts Barrier to Oregon's Law on Aided Suicide,* N.Y. TIMES, June 6, 1998, at A1. Subsequent efforts by opponents to upset Reno's ruling by act of Congress so far have failed to bear fruit. *See* Dave Hogan, *Sen. Hatch Seeks Help in Blocking Suicide Law,* PORTLAND OREGONIAN, Aug 1, 1998, at D1; Nicole Tsong, *Bill to Stop Assisted Suicide Draws Criticism,* PORTLAND OREGONIAN, Aug. 21, 1998, at A10; Alissa J. Rubin, *Fight Ensues to Block Undoing of Doctor-Assisted Suicide Law,* L.A. TIMES, Sept. 15, 1998, at A5; Jim Barnett & Dave Hogan, *Bill to Block Assisted Suicide Falters,* PORTLAND OREGONIAN, Oct. 7, 1998, at A1; Jim Barnett & Dave Hogan, *Senator Drops Effort to Block Suicide Law,* PORTLAND OREGONIAN, Oct. 15, 1998, at A1. Opponents may renew such efforts in 1999. *See* Dave Hogan, *Assisted-Suicide Debate Plans Made,* PORTLAND OREGONIAN, Feb. 7, 1999, at C8. Opponents may also seek to tinker with the Death With Dignity Act in the 1999 Oregon legislature. *See* Erin Hoover Barnett & Lisa Grace Lednicer, *Assisted Suicide Remains a Hot Issue in Legislature,* PORTLAND OREGONIAN, Feb. 7, 1999, at C8.

[58] *See* Arthur E. Chin et al., *Oregon's Death With Dignity Act: The First Year's Experience,* Feb. 17, 1999 (Oregon Health Division 1998 Annual Report available at www.ohd.hr.state.or.us); Arthur E. Chin et al., *Legalized Physician-Assisted Suicide in Oregon—The First Year's Experience,* 340 NEW ENG. J. MED. 577 (1999); Erin Hoover Barnett, *15 Oregonians Chose Assisted Suicide in '98, Report Says,* PORTLAND OREGONIAN, Feb. 18, 1999, at A1; Sam Howe Verhovek, *Oregon Reporting 15 Deaths in Year Under Suicide Law,* N.Y. TIMES, Feb. 18, 1999, at A1; *see also* Timothy Egan, *No One Rushing in Oregon to Use a New Suicide Law,* N.Y. TIMES, Mar. 15, 1998, at 14; Timothy Egan, *First Death Under an Assisted-Suicide Law,* N.Y. TIMES, Mar. 26, 1998, at A14; Susan W. Tolle, *Care of the Dying: Clinical and Financial Lessons From the Oregon Experience,*

tained and used lethal doses of medication have experienced peaceful and relatively quick hastened deaths, thus disproving the 1997 opposition's claims that physician-assisted-dying would result in increased rather than decreased suffering among the terminally ill.[59] Third, and perhaps most importantly, although any quantitative measurement is probably impossible, the greatest value of a statute such as Oregon's lies simply in the reassurance that it offers to terminally ill people who fear dying in tremendous pain, but who in the end do not encounter such serious pain that they actually utilize the Death With Dignity Act. That reassurance factor is actually a larger piece of the Oregon story than the very modest number of people who actually have obtained and used lethal prescriptions to date.[60]

What is now slowly and rather quietly occurring in Oregon is but the first chapter in a story that may well, in the longer run, play out somewhat similarly to how abortion law liberalization took place in the United States. That change began six years before the Supreme Court's 1973 decisions in *Roe v. Wade*[61] and *Doe v. Bolton*,[62] and the initial liberaliza-

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128 ANNALS OF INTERNAL MED. 567 (1998); Barbara Coombs Lee & James L. Werth, Jr., *Observations on the First Year of Oregon's Death With Dignity Act*, 5 PSYCHOL. PUB. POL'Y & LAW (forthcoming 1999).

[59] *See supra* note 54 and accompanying text.

[60] For good journalistic coverage of first-year anniversary developments under the Oregon Death With Dignity Act, see Charlie Cain, *Suicide Debate Remains Unsettled in Oregon*, DETROIT NEWS, Oct. 13, 1998, at B1; Erin Hoover Barnett, *Assisted Suicide, One Year Later*, PORTLAND OREGONIAN, Oct. 27, 1998, at A1; Thomas Maier, *Suicide Law—Year 1—Few in Oregon Have Asked for Help in Dying*, NEWSDAY, Nov. 3, 1998, at C3; Erin Hoover Barnett, *Suicide Law Still Draws Emotional Responses*, PORTLAND OREGONIAN, Dec. 29, 1998, at B1. Also especially note Erin Hoover Barnett's superbly impressive and emotionally powerful four-part series of articles on the death of cancer patient Brian Lovell: *Brian's Journey*, PORTLAND OREGONIAN, Nov. 22-25, 1998, at A1. *See also* Patrick McMahon, *Law Has Changed How Oregonians Die*, USA TODAY, July 14, 1998, at A3, and Erin Hoover Barnett's similar articles on patient Pat Matheny: *Waiting for the Day When He'll be Glad to Die*, PORTLAND OREGONIAN, Oct. 27, 1998, at A8; *Dilemma of Assisted Suicide: When?*, PORTLAND OREGONIAN, Jan. 17, 1999, at A1.

[61] 410 U.S. 113 (1973).

[62] 410 U.S. 179 (1973).

tion statutes adopted in states such as Colorado, North Carolina, and California helped generate a nationwide political ferment that in turn helped stimulate the filing of several dozen constitutional challenges to different states' anti-abortion laws, including *Roe* and *Doe*.[63]

What will happen in the future as a result of Oregon's legal and political breakthrough will probably take place along some or all of four different avenues. First, the West Coast activists are working to build Compassion in Dying into a national federation modeled upon what the Planned Parenthood Federation of America (PPFA) has become for reproductive health issues.[64] Compassion's number one hope is to convince state medical boards, which oversee doctors and set the standards for adequate medical care, to make it clear to physicians that they are just as vulnerable to professional discipline for *underprescribing* pain control medication at the end of life as they believe they are for overprescribing narcotic medicines for patients. There is a widespread consensus among end-of-life specialists that far too many patients suffer needlessly from undermedicated pain, and that if doctors were better attuned to aggressive treatment of pain, such end-of-life suffering could be significantly reduced. Early in 1998, Compassion wrote to the fifty state medical boards requesting that they implement rules and regulations mandating that physicians treat end-of-life pain as intensively as possible, and establish aggressive pain control as the accepted standard of care.[65] Thus, if a physician fails to treat end-of-life pain, the physician will be violating the state's expected standard of care and a potential test case could be mounted against such a physician who failed to treat end-of-life pain aggressively.[66]

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[63] *See* Garrow, *supra* note 19, at 335-88.

[64] As of early 1999, six Compassion affiliates existed (Oregon, Washington, northern California, southern California, New York City and Connecticut). *See 1998 Annual Report—Compassion in Dying Federation* (1999), at 8-9.

[65] For example, New York Governor George Pataki in August 1998 signed into law a reform measure highly similar to one he had vetoed a year earlier. *See* Brian Lewis, *Bill Aims to Make It Easier for Doctors to Prescribe Pain Medication,* BUFFALO NEWS, Aug. 7, 1998, at A14. Compassion in Dying stated in its 1998 Annual Report that it had targeted New York for legal challenge, and "we are told Gov. Pataki signed the bill this time only because of the knowledge that the State would face a lawsuit from Compassion in Dying if no reform were undertaken." *1998 Annual Report* at 13-14. Compassion intends to mount such a

Compassion in Dying's second hope for the immediate future grows out of the fact that both popular understanding and the amount of news coverage of this issue are still significantly larger on the West Coast than anywhere else in the United States. The second avenue which the West Coast activists hope will develop, especially in light of the very striking public opinion polling results noted earlier,[67] is that at least a few state legislatures will begin to consider affirmative liberalization measures.[68] In February 1998, both houses of the Maine legislature debated a bill modeled upon Oregon's Death With Dignity Act before voting it down; however, the forty-two

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suit against some other state. *Id.*

[66] *See* Heather Gordon, *Compassion in Dying Expands Its Influential Reach, Adds Law Center*, WASH. J., Apr. 13, 1998, at 1; Kathryn L. Tucker, *The Death With Dignity Movement: Protecting Rights and Expanding Options After* Glucksberg *and* Quill, 82 MINN. L. REV. 923, 936-37 (1998) [hereinafter Tucker, *The Death With Dignity Movement*]; *see also* Kathryn L. Tucker, *Surrogate End of Life Decision Making: The Importance of Providing Procedural Due Process, A Case Review*, 72 WASH. L. REV. 859 (1997).

In mid-1998 Compassion made just such a complaint to the Medical Board of California on behalf of Beverly Bergman regarding the under-medicated death of her father William Bergman, but the Board rejected the complaint. *See* Sheryl Gay Stolberg, *Amid New Calls for Pain Relief, New Calls for Caution*, N.Y. TIMES, Oct. 13, 1998, at D8; *Dateline NBC: Easing the Pain*, (NBC television broadcast, Jan. 17, 1999), *available in* 1999 WL 6207654; *see also* Erin Hoover Barnett, *Oregon Study Finds Increase in Pain Among the Dying*, PORTLAND OREGONIAN, Oct. 7, 1998, at C4; Dan McGillvray, *Advocates Seek Pain Treatment Rule Changes*, KENNEBEC J., Nov. 9, 1998, at A1; John Hughes, *Relief in Sight for Millions as VA Attacks Pain Systemwide*, SEATTLE POST-INTELLIGENCER, Feb. 1, 1999, at A3.

[67] *See supra* note 2 and accompanying text.

[68] *See, e.g.*, Maureen West, *Sponsor Says Bill Aimed at Ending Pain, Not Life*, ARIZ. REPUBLIC, Nov. 14, 1997, at B1; Paul Hefner, *Backing Sought for Right-to-Die Bill*, L.A. DAILY NEWS, Nov. 15, 1997, at N4 (reporting that two California assembly members considered sponsoring right-to-die bill); Maureen West, *Bill for the Dying Conks Out in House*, ARIZ. REPUBLIC, Apr. 30, 1998, at B1 (reporting that HB 2001 failed to obtain floor vote in Arizona House despite having forty sponsors). *See also* Christine Neylon O'Brien & Gerald A. Madek, *Physician-Assisted Suicide: New Protocol for a Rightful Death*, 77 NEB. L. REV. 229, 260-65, 272-78 (1998).

affirmative votes that the measure received in the Maine House ought to be viewed as a highly positive sign of political progress rather than as simply a defeated numerical minority.[69] While no one anticipates any state legislature adopting such a law in the immediate future, Hawaii's governor has announced that he will ask his state's legislature to give the subject careful consideration in the spring of 1999.[70]

Third, and most directly in the political footsteps of Oregon's success, is the possibility that additional states could adopt some model of a "Death With Dignity" statute by popular vote initiative or referendum. Michigan's statewide electorate voted on exactly such a measure, "Proposal B," on November 3, 1998, and the measure went down to an overwhelming defeat by a margin of 71% to 29%.[71] Outside observers were not optimistic about the political expertise and resources of the measure's proponents even before Geoffrey Fieger, the outrageously provocative attorney for the well-known Dr. Jack Kevorkian, managed to win Michigan's Democratic gubernatorial primary.[72] Fieger's long-shot candidacy against incumbent Republican Governor John Engler did nothing to improve Proposal B's difficult chances.[73] Similarly, but on a different calendar, the Maine activists who fell short of prevailing in their state legislature in early 1998 publicly announced plans to mount an initiative drive to place a "Death With Dignity" measure on the ballot there in either 1999 or 2000.[74]

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[69] Frank Fisher, *House Votes Down Assisted-Suicide Measure*, PORTLAND (Maine) PRESS HERALD, Feb. 12, 1998, at B1 (reporting vote of 99 to 42); *Maine Bill On Suicide Is Rejected*, N.Y. TIMES, Feb. 12, 1998, at A16; *Senate Rejects Assisted Suicide*, PORTLAND (Maine) PRESS HERALD, Feb. 13, 1998, at B3 (reporting vote of 25 to 5); *see also* Paul Carrier, *Legislators Say 'No' to Assisted Suicide*, PORTLAND (Maine) PRESS HERALD, Jan. 29, 1998, at B1 (contrasting twelve to one legislative committee vote against measure with statewide public opinion poll result showing that seventy-one percent of Maine voters favored such law, while only twenty-two percent were opposed).

[70] *Hawaii Governor to Put Euthanasia Before Legislature*, CONGRESS DAILY A.M., June 15, 1998. On February 6, 1999, however, the Committee on Health of the Hawaii House of Representatives voted to "hold" *H.B. 1155, An Act Relating to Physician Assisted Death with Dignity*. On February 19, the Senate Committee handling an identical companion bill, S.B. 1037, voted to do likewise. *See* http://www.capitol.hawaii.gov/session1999/status; *see also* Kathryn L. Braun, *Do Hawaii Residents Support Physician-Assisted Death?*, 57 HAWAII MED. J. 529 (1998); Norman Goldstein, *Governor's Blue-Ribbon Panel on Living and Dying with Dignity*, 57 HAWAII MED. J. 525 (1998); A.A. Smyser, *Doctor-Assisted Death With Dignity*, 57 HAWAII MED. J. 371 (1998); Paul S. Kawai, *Should the Right to Die Be Protected? Physician Assisted Suicide and Its Potential Effect on Hawaii*, 19 U. HAW. L. REV. 783 (1997); Norman Goldstein, *Doctor Assisted Death With Dignity*, 56 HAWAII MED. J. 52 (1997); Lorene K. Siaw & S.Y. Tan, *How Hawaii's Doctors Feel About Physician-Assisted Suicide and Euthanasia: An Overview*, 55 HAWAII MED. J. 296 (1996); A.A. Smyser, *Hawaii Needs a Policy on Assisted Suicide*, 55 HAWAII MED. J. 230 (1996).

[71] *See* George Bullard, *Religious Unity Key to B's Defeat*, DETROIT NEWS, Nov. 5, 1998, at D1; *see also* Yale Kamisar, *Details Doom Assisted-Suicide Measures*, N.Y. TIMES, Nov. 4, 1998, at A27.

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[72] Even though many grass-roots right-to-die activists do feel positively about Kevorkian's efforts, physician-assisted-dying political leaders almost unanimously wish that both Kevorkian and Fieger would just evaporate or otherwise disappear because of their perception that both men have given the issue the worst sort of public image it imaginably could receive. The best-informed study of Kevorkian is MICHAEL BETZOLD, APPOINTMENT WITH DOCTOR DEATH (1993). *See also* Michael Betzold, *The Selling of Doctor Death*, THE NEW REPUBLIC, May 26, 1997, at 22; Marvin Zalman et al., *Michigan's Assisted Suicide Three Ring Circus—An Intersection of Law and Politics*, 23 OHIO N.U. L. REV. 863 (1997).

The November 1998 television broadcast of a videotape depicting the death of yet another Kevorkian "patient" led to another upsurge in news media attention and to Kevorkian's indictment for first degree murder. *See* Tim Kiska & Ron French, *Kevorkian Admits He Killed Patient*, DETROIT NEWS, Nov. 20, 1998, at A1; Brian Harmon, *"Mercy Killing" Goes Public: Tonight's Televised Euthanasia Reflects A Lifelong Crusade by Jack Kevorkian*, DETROIT NEWS, Nov. 22, 1998, at A1; *60 Minutes, Death By Doctor*, (CBS television broadcast, Nov. 22, 1998), *available in* 1998 WL 8973914; Janet Naylor, *Kevorkian: They Must Charge Me*, DETROIT NEWS, Nov. 23, 1998, at A1; Brian Harmon, *CBS News Turns Over Death Tape*, DETROIT NEWS, Nov. 25, 1998, at A1; Dirk Johnson, *Kevorkian Faces A Murder Charge in Death of Man*, N.Y. TIMES, Nov. 26, 1998, at A1; Brian Harmon et al., *Kevorkian Faces Tougher Case*, DETROIT NEWS, Dec. 2, 1998, at D1; Ron French et al., *Zealot of the TV Age, Kevorkian Goes It Alone*, DETROIT NEWS, Dec. 9, 1998, at A1; Brian Harmon, *Kevorkian Ordered to Stand Trial*, DETROIT NEWS, Dec. 10, 1998, at D1; James A. McClear, *Kevorkian Faces March 1 Trial Date*, DETROIT NEWS, Dec. 17, 1998, at D4; *see also* State v. Naramore, 965 P.2d 211 (Kan. Ct. App. 1998); Yale Kamisar, *Line Blurs Between Assisted Suicide, Euthanasia*, DETROIT NEWS, Nov. 25, 1998, at A11.

[73] *See* Charlie Cain, *Officials Approve Vote for Legalized Suicide*, DETROIT NEWS, July 21, 1998, at D1; Gary Heinlein, *Assisted Suicide Finally Before Voters*, DETROIT NEWS, Aug. 31, 1998, at D1; *Ex-Reagan Adviser Urges Fight Against Assisted Suicide*, DETROIT NEWS, Sept. 3, 1998, at C11; David S. Broder, *Choice on Physician-Assisted Suicide Comes Home*, WASH. POST, Oct. 8, 1998, at A20; Charlie Cain, *State's Assisted Suicide Vote Attracts Spotlight*, DETROIT NEWS, Oct. 12, 1998, at A1.

[74] *Suicide Bill Backers to Seek Referendum*, PORTLAND (Maine) PRESS HERALD,

Fourth, "death with dignity" activists appreciate that one or more individual state supreme courts could, on independent state constitutional grounds, decide that language in state constitutions gives fundamental liberty protection to end-of-life choice. In mid-1997, the Florida Supreme Court rejected just such a state constitutional claim,[75] but right-to-die attorneys such as Kathryn Tucker[76] understandably have their eyes on other states where state supreme courts have in recent years rendered strong fundamental individual liberty rulings in cases involving abortion rights claims[77] and/or constitutional challenges to anti-sodomy statutes.[78] Tucker filed her first such case in Alaska in late 1998,[79] and the state constitutional avenue may hold significant promise if "death with dignity" litigators are able to locate interested potential plaintiffs in states whose supreme courts may be receptive to constitutional claims similar to those that persuaded first Judge Rothstein and then a majority of the Ninth Circuit,

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July 23, 1998, at B4; Susan Kinzie, *Low Turnout Makes Initiatives Easier*, BANGER DAILY NEWS, Nov. 7, 1998.

[75] Krischer v. McIver, 697 So. 2d 97, 100-02 (Fla. 1997). *See also* Cecil McIver, *Physician Assistance in Dying: Is It An Ethical Concept?*, ON CALL: THE J. OF THE PALM BEACH COUNTY MED. SOC'Y, Dec. 1996, at 13-15; Shannon Brewer, Comment, *Constitutional Law: Ending the Expansion of the Florida Privacy Amendment*, 49 FLA. L. REV. 821 (1997).

[76] *See* Tucker, *The Death With Dignity Movement*, *supra* note 66, at 933-35; *see also* Charles H. Baron, *Pleading for Physician-Assisted Suicide in the Courts*, 19 W. NEW ENG. L. REV. 371 (1997). *But see* Alan Meisel, *Physician-Assisted Suicide: A Common Law Roadmap for State Courts*, 24 FORDHAM URB. L.J. 817 (1997).

[77] Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969-71 (Alaska 1997).

[78] Gryczan v. State, 942 P.2d 112 (Mont. 1997). *See also* Scott A. Fisk, *The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy*, 59 MONT. L. REV. 301, 339-41 (1998). *But see* William C. Rava, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 ALBANY L. REV. 1681, 1714-16 (1998).

[79] Liz Ruskin, *2 Alaskans Challenge Suicide Law*, ANCHORAGE DAILY NEWS, Dec. 16, 1998, at A1 (reporting that *Sampson v. State* had been filed on December 15 in Third Judicial District Superior Court). Compassion in Dying stated in the 1998 Annual Report that "[l]ocating suitable plaintiffs proved more difficult" than expected, and expressed regret that "we were unable to add a physician plaintiff to the case." *1998 Annual Report* at 10-11.

prior to the Supreme Court's reversal in *Glucksberg*.[80]

If there is one lesson which the history of the birth control litigation which finally culminated in *Griswold*[81] ought to teach us, it is that whether the time line turns out to be five years or eight years or eleven years, the overriding federal constitutional question concerning end-of-life choice will very likely work its way back to the United States Supreme Court. Journalists and historians who write about the Court sometimes are fortunate enough to have a very clear sense of what the members of the Court think the future might bring, and as some members of the implicit five vote majority in *Glucksberg* and *Quill* made quite clear, there is little doubt that one or more of the constitutional questions involving end-of-life care and physician-assisted-dying will again confront the Court.

Politically as well as legally, the issue of physician-assisted-dying will only loom larger and larger in this country in the decade ahead. What makes that most inescapable is the number and proportion of Americans who believe that the terminally ill *should* be able to make their own most fundamental choices at the end of life, existing statutes notwithstanding. Indeed, the safest prediction of all that one can make about "the right to die" is that this is an issue which American political activists, and American courts, will debate with increasing intensity as we enter the twenty-first century, and for many years thereafter as well.

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[80] Washington v. Glucksberg, 117 S. Ct. 2258, 2274-75 (1997).
[81] 381 U.S. 479, 485-86 (1965).

IN DEFENSE OF CONGRESSIONAL POWER AND MINORITY RIGHTS UNDER THE FOURTEENTH AMENDMENT

K. G. Jan Pillai[*]

INTRODUCTION

The provision of the Constitution which grants Congress the power to enforce the rights secured by the Fourteenth Amendment is explicit and unconditional.[1] Nevertheless, ever since the adoption of the Amendment, the Supreme Court has found it expedient to define and redefine the scope of congressional power. Under the early interpretation, rendered by Justices who demonstrably opposed the principles of the Amendment, Congress was permitted to enact only "corrective" legislation needed to counteract any prohibited conduct

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[1] The Fourteenth Amendment provides, in relevant part:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id. § 5.

of the States.[2] But in subsequent decisions, the Court reversed itself and conceded that Congress has the authority to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[3] However, a majority of the Rehnquist Court has embarked on a course, not only to breathe new life into the old discarded restrictive interpretation of congressional power, but to erect new impediments to its exercise as well. The most disconcerting aspect of the newly—minted interpretation is the Court's rather disingenuous effort to make it seem that it has been the most authentic and consistent interpretation of the Court all along and that it faithfully gives effect to the intent of the framers of the Amendment.

In *City of Boerne v. Flores*,[4] the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA),[5] which was enacted by Congress pursuant to its enforcement powers under the Fourteenth Amendment. The Act was specifically designed to overrule the Court's decision in *Employment Division v. Smith*.[6] That case involved the issue of religious freedom of two employees of a private drug rehabilitation facility who were fired and denied unemployment benefits on the ground that they ingested peyote during religious ceremonies in violation of the state's controlled substance law.[7] The *Smith* Court, dismissing the employee's challenge under the Free Exercise Clause of the First Amendment, held that facially neutral laws of general applicability that burden the exercise of religion require no compelling justification to pass constitutional muster.[8] Justice Scalia, writing for the majority, declined to apply the strict scrutiny standard used by the

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[2] The Civil Rights Cases, 109 U.S. 3, 11-12 (1883).

[3] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

[4] 521 U.S. 507 (1997). Justice Kennedy delivered the opinion of the Court in which Chief Justice Rehnquist and Justices Stevens, Thomas and Ginsberg joined. *Flores*, 521 U.S. at 509. Justice Scalia wrote a concurring opinion. *Id.* Justices O'Connor, Breyer and Souter dissented. *Id.*

[5] 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

[6] 494 U.S. 872 (1990).

[7] *Smith*, 494 U.S. at 874.

[8] *Id.* at 888.

Court in prior Free Exercise Clause cases.[9] The RFRA sought to repudiate *Smith's* restrictive interpretation of the Free Exercise Clause, "to restore the compelling interest test," and "to guarantee its application in all cases where free exercise of religion is substantially burdened."[10] Citing *Katzenbach v. Morgan*[11] and *Ex parte Virginia*,[12] two landmark Supreme Court cases on point, Congress asserted that its "power . . . to enforce the 14th amendment includes [the] power to enforce the free exercise clause," and that the RFRA falls squarely within Congress' enforcement power.[13]

Congress enacted the RFRA with the overwhelming support of a legion of interest groups and members of both the House and the Senate.[14] President Clinton declared that the Act, in the "tradition of our Nation's founders," embraced the abiding principle of religious liberty.[15] Constitutional scholars, with rare exceptions,[16] generally recognized the inherent constitutional power of Congress to enact the RFRA.[17] The statute was even hailed as "the most important congressional action with respect to religion since the First Congress proposed the First Amendment."[18] The provisions of the RFRA did not directly or indirectly abridge the religious rights of any group or individuals. Rather, they sought to accommodate the individual rights of adherents of minority religions whose religious practices conflict with generally applicable law.[19]

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[9] *Id.* at 885-86. Strict scrutiny standard would have required the State to demonstrate that the classification based on religion was "narrowly tailored" to achieve a "compelling governmental interest." *Id.* at 885. Justice Scalia believed that what the "compelling governmental interest" requirement "would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Id.* at 886.

[10] 42 U.S.C. § 2000bb(b)(1). The statute restored the compelling interest test as articulated by the Supreme Court in two prior cases. Wisconsin v. Yoder, 406 U.S. 205, 221-24 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963). In *Sherbert,* the Court invalidated a state's refusal to pay unemployment benefits to a member of the Seventh-Day Adventist Church who was fired for refusing to work on Saturday. *Sherbert,* 374 U.S. at 399. In *Yoder,* the Court overturned the convictions of Amish parents who violated a state law that required children to attend school until the age of sixteen. *Yoder,* 406 U.S. at 208. In both cases, the Court applied strict scrutiny. *Sherbert,* 374 U.S. at 406-08; *Yoder,* 406 U.S. at 221. "Many interpreters think Sherbert was an important and correct decision and regret the failure of *Smith* to follow its lesson." R. Brent Hatcher, Jr., City of Boerne v. Flores: *Defining the Limits of Congress's Fourteenth Amendment Enforcement Clause Power,* 49 MERCER L. REV. 565, 580 (1998).

[11] 384 U.S. 641 (1966).

[12] 100 U.S. 339 (1879).

[13] S. REP. NO. 103-141, at 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

[14] *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute,* 56 MONT. L. REV. 39, 39 (1995).

[15] *Id.* (quoting Proclamation No. 6646, 59 Fed. Reg. 2925 (1994)).

[16] *See, e.g.,* William W. Van Alstyne, *The Failure of the Religious Freedom*

But the *Flores* Court, asserting that the exclusive power to interpret and define the rights secured by the Fourteenth Amendment belonged to the judiciary,[20] held that Congress exceeded its enforcement powers when it enacted the RFRA, embracing an interpretation of the Free Exercise Clause that deviated from the Court's interpretation.[21] The Court not only reverted to its ancient characterization of the enforcement power of Congress under the Amendment as "corrective" or "preventive,"[22] but also ended up with the odd conclusion that the power to enforce does not encompass "the power to determine what constitutes a constitutional violation."[23] The Court's majority, in an opinion authored by Justice Kennedy, emphatically maintained that its conclusion that Congress does not possess any "substantive, non-remedial power under

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Restoration Act Under Section 5 of the Fourteenth Amendment, 46 DUKE L.J. 291, 296 (1996); Scott Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 253 (1994).

[17] *See* Thomas C. Berg, *What Hath Congress Wrought?: An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 3 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 245-57 (1993); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 592 (1996); *see also* Rex Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 73-74 (1993); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of § 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1032 (1993).

[18] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 243 (1994).

[19] *See Flores*, 521 U.S. at 544-65 (O'Connor, J., dissenting).

[20] *Id.* at 536.

[21] *Id.*

[22] *Id.* at 524-25.

[23] *Id.* at 519.

the Fourteenth Amendment,"[24] is confirmed by the history and design of the Amendment[25] and supported by case law.[26]

This article attempts to demonstrate that the Court's new interpretation of the scope of Congress' enforcement power is neither supported by its own thoughtful precedents nor by the design and history of the Amendment as the Court now steadfastly claims. Part I examines the Court's holdings in prior cases and finds that they are not entirely consistent with its recent construction of Congress' constitutional powers. In Part II of the article, the analysis of the recorded views of the drafters and ratifiers of the Amendment reveals serious discrepancies in the Court's account of the legislative history that led to its flawed conclusions. Part III examines the debilitating effect of the *Flores* decision on the enforcement of the Americans with Disabilities Act. Part IV explores the unique significance of the conflation of legislative and enforcement powers in section 5 of the Amendment and concludes that the interpretive legislations of Congress, made in the exercise of its legislative and enforcement discretions, deserve binding deference of the judiciary. Finally, the article suggests that the measure of judicial deference that befits the status of Congress as the coordinate, if not the preeminent, and certainly the most democratically accountable, branch of our government should be at least equal to the deference the Court customarily accords to legislative interpretations of agencies charged with the administration of federal statutes.

I. THE INCESSANT FLUCTUATIONS IN JUDICIAL UNDERSTANDING OF CONGRESSIONAL ENFORCEMENT POWER

The scheme of judicial fencing of the enforcement power of Congress began in earnest with the landmark decision in the *Slaughter-House Cases*,[27] which gave the Supreme Court the first opportunity to construe the scope of the Fourteenth Amendment. The cases involved a challenge, based on the Equal Protection Clause and the Privileges and Immunities Clause of the Amendment, to a Louisiana law that granted a monopoly of the slaughterhouse business to one corporation, depriving other competing facilities of their privilege to engage in the same business.[28] The Court dismissed the challenge, holding that the Amendment was not applicable to the case.[29] The Court "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]."[30] The Court also ruled that, even after the adoption of the Amendment, the "entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government."[31] The Amendment, according to the Court, was neither intended to bring within the power of Congress "the entire domain of civil rights heretofore belonging exclusively to the state"[32] nor to afford "protection to the citizen of a State against the legislative power of his own State."[33]

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[24] *Id.* at 527.

[25] *Id.* at 520-23.

[26] *Id.* at 524-26.

[27] 83 U.S. (16 Wall.) 36 (1873).

The constitutional theory enunciated by the Court was premised on the assumptions that there were two distinct sets of rights, privileges and immunities—one belonging to the citizen of the State and the other belonging to the citizen of the United States—which were not legislatively fungible.[34] The

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[28] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 57.

[29] *Id.* at 82-83.

[30] *Id.* at 81.

[31] *Id.* at 77.

[32] *Id.*

[33] *Id.* at 74. Professor Lusky characterized Justice Miller's reasoning in his majority opinion as shabby and even intellectually dishonest. LOUIS LUSKY, BY WHAT RIGHT? 194 (1975). *See also* Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments:* Slaughter House Cases *Re-Examined*, 31 EMORY L.J. 785, 790 (1982) (arguing that "the legal argument underlying the opinion in that case never was satisfactory, and the correct legal analysis of the case suggested [in the article] gives even more reason to reject the decision as precedent").

[34] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74.

Court erected the wall of separation between the two sets more for the protection of State autonomy from federal intrusion than to safeguard the civil rights of citizens of the Union or of the States.[35] The restrictive interpretation of the congressional power was driven by the Court's apprehension that the expanded power granted by the Amendment would encourage Congress to pass not only corrective legislation nullifying offensive State laws, but also "laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions."[36]

Despite their claim of total familiarity with the events—"almost too recent to be called history"—that prompted the Amendment's adoption, the five Justices who supported the decision in the *Slaughter-House Cases* consciously misstated the scope of the Amendment in a way that "profoundly affected the course of the future history of the country."[37] Clearly, they were defying the will of Congress and the ratifying state legislatures, and openly espousing the views of those who opposed the Amendment within and outside the Congress. Four dissenting Justices stated with deep regret that the majority's interpretation had reduced the Amendment to "a vain and idle enactment, which accomplished nothing."[38] They forcefully asserted that the Amendment placed the civil rights of United States citizens—those "natural and inalienable rights which belong to all citizens," regardless of their state of residence—under governmental protection.[39] Of course, the dissenters' views were in accord with those of the creators and promoters of the Amendment.[40]

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[35] *Id.* at 78.

[36] *Id.* The Court also feared that the expansion of federal power would make the federal judiciary "a perpetual censor upon all legislation of the States." *Id.*

[37] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 535 (3d ed. 1935). *See also* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising* the Slaughter-House Cases *Without Exhuming* Lochner: *Individual Rights and the Fourteenth Amendment,* 38 B.C. L. REV. 1, 1 (1996) ("The decision in the *Slaughter-House Cases* liquidated the Privileges or Immunities Clause of the Fourteenth Amendment. The Clause has never been resurrected.").

[38] *Slaughter-House Cases,* 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

[39] *Id.* (Field, J., dissenting).

The decision in the *Slaughter-House Cases*, though greatly disappointing, did not dampen the resolve of the Reconstruction Congress. It proceeded to enact several pieces of legislation, including the Civil Rights Act of 1875, to implement the mandate of the Amendment.[41] The most encouraging development was the Court's apparent willingness in *Ex parte Virginia*[42] to acknowledge and adhere to the original goals of the Amendment. At issue in the case was the constitutionality of section 4 of the Civil Rights Act, which made it a crime to exclude, on racial grounds, any citizen from grand and petit jury service.[43] Rejecting the claim that Congress lacked the power to enact the provision, Justice Strong, writing for the majority, expounded the scope of the Enforcement Clause of the Amendment:

> It is not said that the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged. . . . Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[44]

By making the foregoing powerful statement, in the face of an uncompromising and uncharacteristic dissent of Justice Field,[45] the Court seemed to chart a new course in the interpretation of the Amendment. Justice Field asserted that the states, under the Constitution, enjoyed "absolute freedom from all external interference in the exercise of its legislative, judicial and executive authority"[46] with respect to all their reserved powers, and that congressional "[l]egislation could not, therefore, be appropriate which, under pretense of prohibiting a State from doing certain things, should tend to destroy it, or any of its essential attributes."[47] Embracing the most restrictive interpretation imaginable, Justice Field claimed that the framers of the Enforcement Clause of the Amendment "never contemplated that the prohibition [against the States] was to be enforced in any other way than through the judicial tribunals, as previous prohibitions upon the States had always been enforced."[48] Justice Field's interpretation, if accepted by the Court, would have rendered the Enforcement Clause a nullity.[49]

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[40] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). For instance, Senator Howard, the prime mover of the Amendment in the Senate, declared that the goals of the Amendment were, among other things, "to restrain the power of the States and compel them at all times to respect [the] great fundamental guarantees." *Id.* at 2766. Senator Howard stated that the Amendment also was intended to "put the citizens of the several States on an equality with each other as to all fundamental rights." *Id.* at 2765.

[41] Civil Rights Act of 1875, ch. 14, 18 Stat. 336 (1875).

[42] 100 U.S. 339 (1879).

[43] *Ex parte Virginia*, 100 U.S. at 344.

[44] *Id.* at 345-46.

The Court's fidelity to the ideals and goals of the Amendment, as expressed in *Ex parte Virginia*, did not endure the pressure of national politics shaded by the declining power of the Reconstructionists. In 1883, the Court sharply reversed course with its decision in the famous *Civil Rights Cases*,[50] which struck down a significant part of the Civil Rights Act of 1875[51] that made it a misdemeanor to deny to any person "the full and equal enjoyment" of accommodations and privileges of

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[45] Recall that Justice Field wrote the strongest dissent in the *Slaughter-House Cases* advocating expanded rights and privileges of national citizenship. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 93-111 (Field, J., dissenting).

[46] *Ex parte Virginia*, 100 U.S. at 362 (Field, J., dissenting).

[47] *Id.* (Field, J., dissenting).

[48] *Id.* at 366 (Field, J., dissenting).

[49] It is difficult to pinpoint the motivations of the Justices in making bipolar statements about the meaning of the Amendment. However, it may be helpful to note that Justice Strong, who wrote the historic majority opinion in *Ex parte Virginia*, was a dedicated Republican, and the dissenting Justice Field belonged to the Democratic Party, which waged war against the Amendment in Congress and the state legislatures.

[50] 109 U.S. 3 (1883).

[51] *The Civil Rights Cases*, 109 U.S. at 25-26.

"inns, public conveyances, theaters and other places of public amusement."[52] The Court held that Congress exceeded its authority under the Amendment because the Act sought to punish "individual invasion of individual rights"[53]—rather than "state action of a particular character"[54]—through impermissible legislation of a "primary and direct"[55] character on a subject over which States have legislative jurisdiction.[56] Fastening the most restrictive interpretation onto the enforcement power of Congress,[57] the Court ruled that the Amendment did neither "invest Congress with power to legislate upon subjects which [were] within the domain of state legislation," nor "authorize Congress to create a code of municipal law for the regulation of private rights."[58] The only authority of Congress, the Court insisted, was to enact "corrective legislation" designed to nullify prohibited State laws.[59]

Justice Harlan, in his forceful and articulate dissent, challenged the logic of the majority "that the general government cannot, in advance of hostile state laws or hostile state proceedings, actively interfere for the protection of any of the rights, privileges, and immunities secured by the Fourteenth Amendment."[60] He pointed out the illogic in not recognizing the fact that the congressional power was "in terms distinct and positive, to enforce 'the *provisions of this article*' of amendment; not simply those of a prohibitive character, but the provisions; *all* of the provisions; affirmative and prohibitive, of the amendment."[61] He also underscored the idea that the Amendment presented "the first instance in our history of the investiture of Congress with affirmative power, by *legislation*, to *enforce* an express prohibition upon the States,"[62] and that it was "not said that the *judicial* power of the nation may be exerted for the enforcement of that amendment."[63] Justice Harlan was analytical and persuasive in reaching the conclusion that the enforcement provision granted Congress ample power to enact "legislation, operating throughout the entire Union, to guard, secure and protect" all the rights created by the Amendment.[64]

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[52] Civil Rights Act of 1875, ch. 114, 18 Stat. 336 (1875).

[53] *The Civil Rights Cases*, 109 U.S. at 11.

[54] *Id.* The Court stated, "It is state action of a particular character that is prohibited [by the Fourteenth Amendment]. Individual invasion of individual rights is not the subject-matter of the Amendment." *Id.*

[55] *Id.* at 19.

[56] *Id.* at 11.

[57] *Id.* at 26 (Harlan, J., dissenting).

[58] *Id.* at 11.

[59] *Id.* at 18-20.

[60] *Id.* at 44-45 (Harlan, J., dissenting).

[61] *Id.* at 46-47 (Harlan, J., dissenting) (emphasis in original).

Justice Harlan's words undoubtedly echoed the majority opinion of Justice Strong in *Ex parte Virginia*.[65] The Court in *The Civil Rights Cases* was simply rehashing the theory of undiminished state autonomy constructed in the *Slaughter-House Case* and caricatured in Justice Field's dissent in *Ex parte Virginia*.[66] It should be noted that Justice Strong in *Ex parte Virginia* rejected a "state action" argument similar to the one raised in *The Civil Rights Cases*.[67] In *Ex parte Virginia*, the State argued that the exclusion of blacks from jury was a private act of the county judge acting without the authorization or direction of state law, and, therefore, the Amendment was inapplicable to the racist conduct.[68] The Court rejected the

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[62] *Id.* at 45 (Harlan, J., dissenting) (emphasis in original).

[63] *Id.* (Harlan, J., dissenting) (emphasis in original)

[64] *Id.* at 47 (Harlan, J., dissenting). Justice Harlan was also emphatic on the exclusive nature of Congress's discretion in deciding the nature and content of legislation enacted under the Enforcement Clause. Justice Harlan stated, "But it is for Congress, not the judiciary, to say which [legislation] is best adapted to the end to be attained." *Id.* at 50 (Harlan, J., dissenting).

[65] *See supra* note 44 and accompanying text.

[66] *See supra* notes 45-48 and accompanying text.

[67] *Id.* at 57-58 (Harlan, J., dissenting) (citing *Ex parte Virginia*, 100 U.S. 339, 346-47 (1979)).

[68] *Id.* at 58 (Harlan, J., dissenting) (citing *Ex parte Virginia*, 100 U.S. at 346-47). Justice Strong responded to Justice Field's state autonomy argument as follows:

> Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. . . . [T]he general government [cannot be denied] the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government

argument by holding that the Amendment encompassed all state action regardless of "whatever instruments or in whatever modes that action may be taken."[69] In the same vein, Justice Harlan's dissent discounted the utility and effectiveness of the state action requirement.[70] He pointed out that the framers of the Amendment were perfectly aware that the danger to the equal enjoyment by citizens of their rights came "not altogether from unfriendly State legislation, but from hostile action of corporations and individuals in the States."[71] He had no doubt that "within the principle settled in *Ex parte Virginia*," railroad corporations, keepers of inns and managers of places of public amusement were "agents or instrumentalities of the State . . . in respect of their duties and functions," and, therefore, amenable to regulation in the interest of preventing racial discrimination and securing the civil rights of citizens.[72]

The theories of state action and state autonomy that the Court adverted to in *The Civil Rights Cases* appeared to be pretexts to deny Congress its legitimate enforcement powers under the Reconstruction Amendments at any cost. Even if these theories rationalized the confinement of congressional power under the Fourteenth Amendment to remedial legislation, they were not helpful in limiting the enforcement power under the Fifteenth Amendment. The Court had no choice but to concede to Congress unconditional power to enact legislation "primary and direct in character," that is necessary and proper "for the obliteration and prevention of slavery, with all its badges and incidents."[73] But still, the Court was unwilling to let Congress prohibit racial discrimination in the services and

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> involves a corresponding diminution of the governmental powers of the States. It is carved out of them. . . . Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured.

Ex parte Virginia, 100 U.S. at 346-47.

[69] *Id.*

[70] *The Civil Rights Cases*, 109 U.S. at 58 (Harlan, J., dissenting).

[71] *Id.* at 54 (Harlan, J., dissenting).

[72] *Id.* at 58-59 (Harlan, J., dissenting).

[73] *Id.* at 20-21.

accommodations of inns, public conveyances, theaters and places of public amusement under the theory that "[m]ere discrimination [in such facilities] on account of race or color were not regarded as badges of slavery."[74]

A. *Animating the Dominant Mission of the Amendment*

The Civil Rights Cases and their progeny[75] have severely disabled the national government from pursuing the goals of the Civil War Amendments as originally envisioned. Their chilling effect was so menacing that no enforcement legislation emerged from Congress during the following eight decades. It took the civil rights movement of the turbulent 1960s to remind the nation that the fundamental mission of the Amendments still remained unfulfilled. The federal government was forced to crank up executive and legislative programs[76] to protect the civil rights of racial minorities. The Supreme Court, led by Chief Justice Warren, was already ahead of the other two branches in sensing the urgent need to correct its past mistakes. The Court, in *Brown v. Board of Education*,[77] had already discarded the infamous "separate-but-equal" doctrine of the Equal Protection Clause,[78] and set in motion the program of school desegregation "with all deliberate speed."[79] As a result of a conscientious process of judicial soul-searching and self-evaluation, the Court succeeded in systematically dismantling all the major barriers erected by its prior decisions against congressional enforcement of the Civil War Amendments.

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[74] *Id.* at 25.

[75] *See, e.g.*, Hodges v. United States, 203 U.S. 1, 16-19 (1906) (invalidating provision of Civil Rights Act of 1866 which criminalized conspiracies to prevent blacks from exercising their right to contract, on grounds that only conduct which actually enslaved someone was prohibited by Thirteenth Amendment); United States v. Harris, 106 U.S. (16 Otto) 629, 638-40 (1883) (invalidating Ku Klux Klan Act of 1871, which criminalized private conspiracies against state officials and depriving persons of equal protection of laws, on grounds that Fourteenth Amendment did not authorize Congress to prohibit purely private conduct).

[76] Presidents Kennedy, Johnson and Nixon issued a series of Executive Orders prohibiting racial discrimination in public contracting and in programs that received federal financial assistance. Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

[77] 347 U.S. 483 (1954). *See also* Brown v. Board of Educ., 349 U.S. 294, 298-301 (1955) (stating that states must "make a prompt and reasonable start" to implement and comply with prior *Brown* holding); Cooper v. Aaron, 358 U.S. 1, 7-17 (1958) (holding that state government and school board delay in implementing *Brown* was contrary to its holding requiring prompt compliance).

[78] *Brown*, 347 U.S. at 495.

Two of the major shackles clamped by *The Civil Rights Cases* on the enforcement power of Congress under the Fourteenth Amendment were removed by the Court's decision in *United States v. Guest.*[80] One of the critical issues in the case was whether "legislation indubitably designed to punish entirely private conspiracies to interfere with the exercise of Fourteenth Amendment rights constitute[d] a permissible exercise of the power granted to Congress by § 5 of the Fourteenth Amendment."[81] Six members of the Court expressed the view "that section 5 empowere[d] Congress to enact laws punishing all conspiracies" that interfered with rights created by and arising under the Amendment "whether or not state officers or others acting under the color of state law are implicated in the conspiracy."[82]

Justice Brennan, in his separate opinion, also took issue with the Court's holding in prior cases (especially *The Civil Rights Cases*)[83] that "Congress' power under section 5 [was] confined to the adoption of 'appropriate legislation for correcting the effects of . . . prohibited state laws and state acts, and thus to render them effectually null, void and innocuous.'"[84] He stated:

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[79] *Brown*, 349 U.S. at 301.

[80] 383 U.S. 745 (1966). The case came to the Court as a direct appeal from the dismissal of an indictment of six individuals who were charged with conspiracy to injure, threaten or intimidate black citizens in the exercise of their right to "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants and other places of public accommodation" as guaranteed by section 201 of the Civil Rights Act of 1964. *Guest*, 383 U.S. at 749.

[81] *Id.* at 781-82 (Brennan, J., concurring in part and dissenting in part). Justice Stewart, who announced the judgment of the Court, bypassed the constitutional question by finding an alternative ground for reversal of the lower court. *Id.* at 749-55.

[82] *Id.* at 782 (Brennan, J., with whom the Chief Justice and Justice Douglas joined, concurring in part and dissenting in part.). The concurring opinion of Justice Clark, with whom Justices Black and Fortas joined, stated: "I believe [it is] both appropriate and necessary under the circumstances here to say that *there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.*" *Id.* at 762 (Clark, J., concurring) (emphasis added).

> I do not accept—and a majority of the Court today rejects—this interpretation of § 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary; and it attributes a far too limited objective to the Amendment's sponsors. . . . Viewed in its proper perspective, § 5 of the 14th Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens.[85]

Congress' enforcement power, as originally envisioned by the framers of the Fourteenth Amendment, was fully restored by the Court in *Katzenbach v. Morgan*.[86] At issue in *Morgan* was the constitutionality of a provision of the Voting Rights Act of 1965 which in effect outlawed the New York English literacy requirement that deprived a substantial number of Spanish-speaking residents of New York City of their voting privileges in any election.[87] The State successfully argued in the district court that Congress, by meddling with voter qualifications, had unconstitutionally usurped powers reserved to the states by the Tenth Amendment.[88] However, the Supreme Court summarily rejected the argument, stating that "the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment."[89] The most constitutionally significant contention of the State was that the challenged provision could never be considered "appropriate legislation" under section 5 of the Fourteenth Amendment[90] unless and until the judicial branch decided that the English literacy requirement was forbidden by the Equal Protection Clause. Since the Court previously decided in *Lassiter v. Northampton County Board of Elections*[91] that literacy requirements were not violative of the Amendment, the issue submerged in the State's contention was whether Congress could decide to prohibit the requirements notwithstanding the contrary decision of the judiciary.[92]

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[83] *Id.* at 782 (Brennan, J., concurring in part and dissenting in part).

[84] *Id.* at 782-83 (Brennan, J., concurring in part and dissenting in part) (citing *the Civil Rights Cases*, 109 U.S. at 11).

[85] *Id.* at 783-84 (Brennan, J., concurring in part and dissenting in part) (footnotes omitted).

[86] 384 U.S. 641 (1966).

[87] *Morgan*, 384 U.S. at 643. Section 4(e) of the Voting Rights Act provided that "no person who has successfully completed the sixth primary grade in a school accredited by the Commonwealth of Puerto Rico in which the language of instruction was other than English, shall be denied the right to vote in any election because of his inability to read or write English." 42 U.S.C. § 1973(b)(a) (1964).

[88] Morgan v. Katzenbach, 247 F. Supp. 196, 200-01 (D.C. Cir. 1965). The dis-

The Court's response was clear and unequivocal. It ruled that "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[93] Recognizing the institutional competence of Congress "to assess and weigh the various conflicting considerations" that undergird the voting rights legislation,[94] the Court was more than willing to uphold the constitutionality of the prohibition of the English literacy requirement if it could "perceive a basis upon which Congress might predicate a judgment" that the requirement violated the Equal Protection Clause.[95] The Court reaffirmed its holding in *Ex parte Virginia* that the proper measure of what constitutes "appropriate legislation" under section 5 was the "classic" standard established by Chief Justice Marshall in *McCulloch v.*

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trict court granted the injunction and declaratory relief as requested by the State of New York, and the City Board of Elections, enjoining the enforcement of or compliance with the challenged provision. *Morgan*, 247 F. Supp. at 204.

[89] *Morgan*, 384 U.S. at 647.

[90] U.S. CONST. amend. XIV, § 5.

[91] 360 U.S. 45 (1959).

[92] *Lassiter*, 360 U.S. at 53-54.

[93] *Morgan*, 384 U.S. at 651.

[94] *Id.* at 653.

[95] *Id.* at 656.

Maryland for the review of legislation enacted under the Necessary and Proper Clause of the Constitution.[96] The Court dismissed the suggestion that an enforcement legislation of Congress would not be appropriate unless it was directed to state legislation that was predetermined by the judiciary as violative of the Amendment.[97] Such a construction of section 5, the Court said, "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment" and reduce Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional or, of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment."[98]

The Warren Court's comprehensive design to rehabilitate the enforcement powers of Congress was also evident in its decisions under the Thirteenth and Fifteenth Amendments. In *The Civil Rights Cases*, the Court, even after conceding Congress' plenary power under the Thirteenth Amendment "to pass all laws necessary and proper for abolishing all badges and incidents of slavery," reserved for itself the power to decide what were those incidents and badges,[99] and then proceeded to conclude that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."[100] Two decades later, the Court in *Hodges v. United States*[101] went to such extreme as to assert that only conduct that actually enslaved someone could be subjected to punishment under the Thirteenth Amendment, and that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."[102]

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[96] *Id.* at 650. The standard of judicial review established in *McCulloch v. Maryland* was adopted and defined in *Ex parte Virginia* in the following terms:

> Whatever legislation is appropriate, that is, adapted to carry out the objects of the [Civil War] [A]mendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. at 345-46.

[97] *Morgan*, 384 U.S. at 648.

[98] *Id.* at 648-49. It should be noted that Justice Brennan's majority opinion in *Morgan* included a footnote which stated in part that section 5 "grants Congress no power to restrict, abrogate or dilute [the] guarantees [of the Fourteenth Amendment]." *Id.* at 651 n.10. This suggested that Congress has only the power to broaden the application of constitutional rights, but not the power to narrow them. *See* Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendment*, 67 MINN. L. REV. 299, 309 (1982).

[99] *The Civil Rights Cases*, 109 U.S. at 20.

In *Jones v. Alfred H. Mayer Co.*,[103] the Warren Court not only overruled *Hodges v. United States*, but also liberated Congress from the restrictions imposed on its enforcement power by *The Civil Rights Cases*.[104] Defending a provision of the Civil Rights Act of 1866 which prohibited private and public racial discrimination in the sale or rental of property,[105] the Court in *Jones* held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[106]

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[100] *Id.* at 24-25.

[101] 203 U.S. 1 (1906).

[102] *Hodges*, 203 U.S. at 18.

[103] 392 U.S. 409 (1968).

[104] *Jones*, 392 U.S. at 439.

[105] *Id.* at 440. At issue in *Jones* was the power of Congress under the Thirteenth Amendment to enact a section of the Civil Rights Act of 1866. *Id.* at 412. The section stated: "Property rights of citizens. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1994).

[106] *Jones*, 392 U.S. at 440. The significance of the Court's holding was highlighted by the vigorous dissent of Justice Harlan, joined by Justice White, which stated:

> The foregoing analysis of the language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly un-

The Warren Court's interpretation of the enforcement power of Congress under the Fifteenth Amendment was equally broad and unrestricted. In *South Carolina v. Katzenbach,*[107] the Court sustained the power of Congress to enact the Voting Rights Act of 1965, "probably the most radical piece of civil rights legislation since Reconstruction."[108] The Act established a complex scheme of stringent extra-judicial remedies to deal with the widespread patterns and practices of voting discrimination in "unremitting and ingenious defiance of the Constitution."[109] South Carolina argued that "Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts."[110] Holding that "Congress is not circumscribed by any such artificial rules,"[111] the Court laid down the constitutional standard for enforcement legislation:

> Congress has full remedial powers to effectuate the constitutional prohibition of racial discrimination in voting. . . . The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States [as articulated in *McCulloch v. Mary-*

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tenable.

Id. at 473 (Harlan, J., dissenting).

The dissenters also challenged the constitutionality of the statute:

> In holding that the Thirteenth Amendment is sufficient constitutional authority for § 1982 as interpreted, the Court also decides a question of great importance. Even contemporary supporters of the aims of the 1866 Civil Rights Act doubted that those goals could constitutionally be achieved under the Thirteenth Amendment, and this Court has twice expressed similar doubts, see *Hodges v. United States*, 203 U.S. 1, 16-18; *Corrigan v. Buckley*, 271 U.S. 323, 330.

Id. at 476-77 (Harlan, J. dissenting).

[107] 383 U.S. 301 (1966). The opinion of the Court was written by Chief Justice Warren.

[108] LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 336 (2d ed. 1988).

[109] *Katzenbach*, 383 U.S. at 309.

[110] *Id.* at 327.

[111] *Id.*

land]."[112]

The Warren Court's symmetrical interpretation of the enforcement provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments firmly established certain basic principles. First, Congress, not the judiciary, was chiefly responsible for implementing the rights created by the Amendments.[113] Second, Congress is authorized by the provisions to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Amendments.[114] Third, the standard set by *McCulloch v. Maryland* to determine the constitutionality of congressional legislation in relation to the reserved powers of the States is the measure of appropriateness of legislation enacted to enforce the rights secured by the Amendments.[115] Fourth, congressional legislation can reach and punish private conspiracies—with or without state action—that interfere with the rights secured by the Amendments.[116] Finally, a favorable judicial determination concerning the constitutionality of a State action would not necessarily preclude Congress from outlawing the same action as violative of the Amendments.[117]

For the most part, these principles were upheld, and at times reinforced, by the decisions of the Burger Court. In *Oregon v. Mitchell*,[118] the Justices unanimously upheld a provision of the 1970 amendments to the Voting Rights Act that imposed a five-year nationwide ban on the use of literacy tests and other devices as a prerequisite for voting or registration.[119] Even though the Court failed to produce a single majority opinion in the case, mostly due to the Justices' disagreement over another provision of the statute that reduced the voting age from twenty-one to eighteen in federal and state elections,[120] the multiple opinions of the Justices clearly echoed the jurisprudence of the Warren Court.[121] The Burger Court's most resounding endorsement of the broad power of Congress under the Fifteenth Amendment was made in *City of Rome v. United States.*[122] That case presented the issue of congressional power to enact section 5 of the Voting Rights Act of 1965, which required preclearance by the Attorney General or the United States District Court for the District of Columbia of any change in the electoral system by any of the designated jurisdictions.[123] The city of Rome, Georgia, claimed that section 1 of the Fifteenth Amendment prohibited only purposeful racial discrimination in voting and that in enforcing that provision pursuant to section 2, Congress could not prohibit voting practice lacking discriminatory intent even if they were discriminatory in effect.[124] Rejecting the claim, the Court, in a six to three decision, held "that, even if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."[125] According to the Court, the only limitation on the legislation prohibiting practices that were not in and of themselves violative of section 1 of the Amendment was its appropriateness, "as that term [was] defined in *McCulloch v. Maryland* and *Ex parte Virginia*."[126]

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[112] *Id.* at 326.

[113] *Id.*

[114] *Morgan*, 384 U.S. at 651.

[115] *See Jones*, 392 U.S. at 443-44; *Morgan*, 384 U.S. at 650-651; *Katzenbach*, 383 U.S. at 326-27.

[116] *See* United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring) (stating that Congress had power to outlaw private conspiracies, such as right to utilize public utilities); *id.* at 782 (Brennan, J., concurring in part and dissenting in part) (arguing that Congress may enact laws punishing all conspiracies).

[117] *Morgan*, 384 U.S. at 649 (outlawing New York English literacy test notwithstanding Court's decision in *Lassiter v. Northampton County Board of Election* in which North Carolina English literacy requirement was upheld).

[118] 400 U.S. 112 (1970).

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[119] *Mitchell*, 400 U.S. at 132. The Court held that Congress could rationally have determined that the literacy tests were likely to be used for the perpetration of racial discrimination in voting. *See id.* at 132-33; *id.* at 144-47 (Douglas, J., concurring in part and dissenting in part); *id.* at 216-17 (Harlan, J., concurring in part and dissenting in part); *id.* at 231-35 (Brennan, White and Marshall, JJ., concurring in part and dissenting in part); *id.* at 283-84 (Stewart, J., concurring in part and dissenting in part).

[120] *Id.* at 117-18. The provision that lowered the voting age was upheld for federal elections by a five to four vote. *Id.* at 125. Five Justices specifically held the view that the provision was unconstitutional as applied to state elections because the power to regulate such elections was left to the exclusive domain of the States by the Tenth Amendment. *Id.* at 125. Congress thought that the discrimination between people within the age group of eighteen to twenty-one and people of twenty-one or above was irrational under the Equal Protection Clause because eighteen-year olds could make the same mature and informed voting decisions as twenty-one year olds. *Id.* at 124. The country immediately sensed the wisdom of Congress and the absurdity of the position of five Supreme Court Justices, and within months after the *Mitchell* decision, ratified the Twenty-sixth Amendment to the Constitution. The Amendment states: "(1) The rights of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. (2) Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XXVI §§ 1-2.

[121] *Mitchell*, 400 U.S. at 117-18. The following are some significant statements of the Justices: "[A]s against the reserved power of the States, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end." *Id.* at 286 (Stewart, J., concurring in part and dissenting in part). "The original design of the Founding Fathers was altered by the Civil War Amendments" and "the division of powers between State and national governments . . . was expressly qualified by the Civil War Amendment's ban on racial discrimination." *Id.* at 126-29 (Black, J., writing the opinion of the Court). "When state and federal claims come into conflict, the primacy of federal power requires that the federal finding of fact control." *Id.* at 249 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

[122] 446 U.S. 156 (1980).

The significance of the Court's interpretation was highlighted by Justice Rehnquist's dissent which asserted that the majority's "theory that Congress has the authority under its enforcement powers to determine, without more, that electoral changes with a disparate impact on race violate the Constitution [implied that] Congress by a legislative Act could effectively amend the Constitution."[127] This assertion was based on the unfounded assumption that the Fifteenth Amendment's prohibition was confined to intentional racial discrimination in voting and that Congress was overstepping the constitutional bounds by prohibiting disparate impact discrimination. No such artificial limitation is found on the face of the Amendment nor is espoused in judicial precedents.[128] More interestingly, the assertion implicitly advanced the theory that the Supreme Court "by a judicial act, could effectively amend the Amendment" just by interpreting or enforcing its provisions.[129] Such a theory of judicial legislation would not be sanctioned even by *Marbury v. Madison.* Another noteworthy feature of Justice Rehnquist's dissent was its undisguised longing for the restoration of the discarded theory of *The Civil Rights Cases* that the enforcement powers of Congress were remedial only.[130]

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[123] *City of Rome*, 446 U.S. at 162-63.

[124] *Id.* at 173.

[125] *Id.*

[126] *Id.* at 177.

[127] *Id.* at 210 (Rehnquist, J., dissenting).

[128] Justice Rehnquist claimed that in *City of Mobile v. Bolden*, "at least four

Overcome by irresistible nostalgia or not, Justice Rehnquist flatly claimed that the construction of the Court in *The Civil Rights Cases* "has never been refuted by a majority of

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members of the Court . . . held that purposeful discrimination would be prerequisite to establishing a constitutional violation in a case alleging vote dilution under the Fourteenth and Fifteenth Amendments." *Id.* at 211 n.3. The plurality that insisted on the intent requirement (consisting of Justices Stewart, Powell, Rehnquist and Chief Justice Burger) was interpreting section 2 of the Voting Rights Act, which provided that no voting qualification or standard or practice shall be imposed or applied by any State or political subdivision to *deny or abridge* the right of any citizen of the United States to vote on account of race. City of Mobile v. Bolden, 446 U.S. 55, 60 (1980). In 1982, Congress amended the section to substitute the words "in a manner which results in a denial or abridgement of" for "to deny or abridge." 42 U.S.C. § 1973(a). In 1986, the Supreme Court, citing the Senate Report on the 1982 amendments, stated that it "dispositively rejects the position of the plurality in *Mobile v. Bolden,* which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." Thornburg v. Gingles, 478 U.S. 30, 43-44 (1986). The rejection of the intent requirement by the Congress was agreed to by the Court in *Thornburg v. Gingles. Thornburg,* 478 U.S. at 46. Thus, the majority decision in *City of Rome v. United States* remains the prevailing interpretation of the Fifteenth Amendment.

[129] *City of Rome,* 446 U.S. at 210 (Rehnquist, J., dissenting).

[130] *Id.* at 219-20 (Rehnquist, J., dissenting). Justice Rehnquist stated:

> The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority groups' ability to elect a candidate of their race violates the Fourteenth or Fifteenth Amendment. This construction . . . was rejected in the Civil Rights Cases. . . . The Court emphasized that the power conferred was 'remedial' only. . . . This construction has never been refuted by a majority of the Members of this Court."

Id. at 219-20. Notably, the Court did not adhere to this construction in *United States v. Guest* or in *Katzenbach v. Morgan. See supra* notes 80, 86, and accompanying text.

the Members of this Court."[131] To prove his claim, he cited *Oregon v. Mitchell*, in which "five members of the Court were unwilling to conclude that Congress had the power to determine that establishing the age limitation for voting at 21 denied equal protection to those between the ages of 18 and 20."[132] Justice Rehnquist did not mention the fact that the five Justices made an error of historic proportion, because their interpretation of the Equal Protection Clause was swiftly rejected within months by Congress and the nation by adopting the Twenty-sixth Amendment to the Constitution.[133] Justice Rehnquist quite conveniently relegated *Katzenbach v. Morgan* to a footnote, claiming that while the majority opinion in the case "did contain language suggesting a rejection of the 'remedial' construction of the enforcement powers, the opinion also advanced a remedial rationale which support[ed] the determination reached by the Court."[134] This was a classic understatement of the holding of *Morgan*.[135]

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[131] *City of Rome*, 446 U.S. at 220 (Rehnquist, J., dissenting).

[132] *Id.* at 220-21 (Rehnquist, J., dissenting).

[133] *See supra* note 120. The Twenty-sixth Amendment was adopted and ratified with lightning speed. The decision in *Mitchell* was handed down on December 21, 1970. *Mitchell*, 400 U.S. at 112. Congress submitted the Twenty-sixth Amendment to the States for ratification three months later. On June 30, 1971, the ratification process was completed. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1005 (13th ed. 1997).

[134] *City of Rome*, 446 U.S. at 220 n.8 (Rehnquist, J., dissenting).

[135] The real significance of *Morgan* was its acceptance of the power of Congress to interpret the Fourteenth Amendment for the purpose of enforcement. The Court held that section 5 of the Amendment granted legislative power "authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Morgan*, 384 U.S. at 651.

> It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

Id. at 653.

Thus, the Court in *Morgan* conceded to Congress' independent interpretive

Faithfully following the trend set by its predecessor, the Burger Court interpreted section 5 of the Fourteenth Amendment expansively to permit Congress to deal with the national problems of inequality and discrimination. It easily brushed aside the customary argument that the principle of state autonomy stood as a constitutional obstacle to Congress' enforcement power. For instance, in *Fitzpatrick v. Bitzer*,[136] upholding the constitutionality of the extension of Title VII of the Civil Rights Act of 1964[137] to state government employment practices, the Court ruled that

> the Eleventh Amendment, and the principle of state sovereignty which it embodies. . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.[138]

In the landmark case of *Fullilove v. Klutznick*,[139] the Court acknowledged that "Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems,"[140] and that no organ of government, state or federal, possesses a more comprehensive constitutional

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authority under section 5 of the Amendment to decide whether a particular act or conduct of states violated the Constitution. The opinion of Justice Brennan did not just "contain language suggesting a rejection of the 'remedial' construction," as claimed by Justice Rehnquist. *City of Rome*, 446 U.S. at 220 n.8. Rather, the entire decision stands for the proposition that Congress can enact legislation, remedial or not, to secure the rights guaranteed by the Fourteenth Amendment. *Id.* The need for gaining political power to receive nondiscriminatory city services, which the Court alluded to, had a remedial character, but that was just the desirable outcome of gaining nondiscriminatory voting rights. *Morgan*, 384 U.S. at 652.

[136] 427 U.S. 445 (1976).

[137] 42 U.S.C. §§ 2000e to 2000e-17 (1994). The 1972 amendment to Title VII of the Civil Rights Act not only brought state employers within its sweep, but also provided that successful plaintiffs in an employment discrimination case could recover retroactive monetary relief. 42 U.S.C. § 2000e-5(g).

[138] *Fitzpatrick*, 427 U.S. at 456.

[139] 448 U.S. 448 (1980).

[140] *Fullilove*, 448 U.S. at 486.

power, "competence and authority to enforce the equal protection guarantees."[141] The Court upheld, by a six to three majority, a requirement that at least ten percent of the federal funds received by state and local governments for public works projects must be utilized to procure supplies and services from business enterprises owned and controlled by members of designated minority groups.[142] The opinion of Chief Justice Burger, announcing the judgment of the Court, specifically cited prior cases from *Katzenbach v. Morgan* to *City of Rome v. United States* to underscore the discretionary power of Congress under the enforcement provision of the Fourteenth Amendment.[143] He concluded that:

> Congress reasonably determined that the prospective elimina-

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[141] *Id.* at 483.

[142] *Id.* at 492.

[143] *Id.* at 476-78. The Court quoted the statement of *Morgan* that section 5 authorizes Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 476 (quoting *Morgan*, 394 U.S. at 651). The Chief Justice cited *Oregon v. Mitchell*, pointing out that a unanimous Court had approved the nationwide ban on literacy tests as an "appropriate method of attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only." *Id.* at 477. He also cited *South Carolina v. Katzenbach* to underscore that the power of Congress "extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination." *Id.* He also cited *Lau v. Nichols* to support the proposition that Congress has the power to prohibit use of educational methods or criteria by recipients of federal funds that would produce a discriminatory effect on non-English speaking pupil's access to education. *Id.* at 479.

The Chief Justice also relied on *Swann v. Charlotte-Mecklenburg Board of Education* to "reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion." *Id.* at 482.

The Chief Justice's opinion was joined by Justices Powell and White, and the judgment was shared by Justice Marshall in a separate opinion in which Justices Brennan and Blackmun concurred. *Id.* at 517-21 (holding racial classifications in set-aside program were constitutional because they related to important goal of remedying present and past racial discrimination). Justice Stewart wrote a dissenting opinion in which Justice Rehnquist concurred. *Id.* at 522-32 (arguing 14th Amendment prohibits even remedial racial classifications). Justice Stevens wrote a separate dissenting opinion. *Id.* at 532-54 (asserting set-aside program failed to meet "narrowly tailored" requirement because it was not apparent that all groups benefitted by racial classification have suffered past discrimination).

> tion of [the] barriers to minority firm access to public contracting opportunities [by the ten percent set-aside] was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws.[144]

Addressing the evidentiary basis required to sustain an enforcement legislation, the Chief Justice ruled that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."[145] The Court was "satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination."[146] The Chief Justice recognized that the minority set-aside program may disappoint the expectations of nonminority firms that were not guilty of any past discriminatory conduct.[147] However, he found that "it was within congressional power *to act on the assumption* that in the past some nonminority businesses *may have reaped competitive benefit* over the years from the virtual exclusion of minority firms from these contracting opportunities."[148] The Chief Justice categorically rejected the color-blind concept which the opponents of the program had hoisted as an obstacle to race-conscious affirmative action.[149] He also specifically declined to evaluate the set-aside under the standards of strict or intermediate standards of scrutiny.

The dissenting opinion of Justices Stewart and Rehnquist took a dismal view of the enforcement powers of Congress.

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[144] *Id.* at 478.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 485 (emphasis added).

[149] *Id.* at 482. The Chief Justice repeated the holding in *North Carolina Board of Education v. Swann* that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.* (quoting North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971)).

Espousing the theory of a color-blind Constitution, they insisted that Congress had no power to establish race-conscious programs except to remedy the effects of its own past discrimination, a condition that was not shown to exist in the case.[150] They even seemed to eviscerate Congress' unique section 5 power with the bold statement that "nothing in the Constitution gives Congress any greater authority to impose detriments on the basis of race than is afforded the Judicial Branch."[151] The statement imprudently equated Congress' "burden of dealing with a host of intractable economic and social problems" with the luxury of a federal court fortuitously dealing with a dispute solely based on the facts and arguments presented from the viewpoints of dueling litigants. Of course, the Justices were just restating the theme of their dissent in *City of Rome v. United States.*[152]

B. *Reemergence of the Discarded Interpretation*

The *Fullilove* dissenters' views began to gain ground in the Court's decisions in the mid-eighties, when race-based and gender-based affirmative action took center stage in the legal debate over the content and meaning of the Equal Protection Clause. In *Wygant v. Jackson Board of Education*,[153] Justice Rehnquist was in the company of three other justices who maintained that race-based preferences must be subjected to strict scrutiny. Writing for the plurality,[154] Justice Powell found that the protection given to minority teachers against layoff, pursuant to the provisions of a collective bargaining agreement, violated the Equal Protection Clause because the school board failed to demonstrate a compelling interest to justify the deprivation of seniority rights of nonminority teachers.[155] The school board's asserted interest in having a racially integrated faculty or in providing appropriate role models to the minority students did not qualify as a compelling interest.[156]

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[150] *Id.* at 527 (Stewart, J., dissenting).

[151] *Id.* at 528 (Stewart, J., dissenting).

[152] *City of Rome*, 446 U.S. at 206 (Rehnquist, J., dissenting). *See supra* notes 127-35 and accompanying text.

[153] 476 U.S. 267 (1986).

[154] *Wygant*, 476 U.S. at 269. The plurality opinion of Justice Powell was joined by Chief Justice Burger and Justice Rehnquist. Justice O'Connor, in a separate opinion, advocated strict scrutiny. *Id.* at 285 (O'Connor, J., concurring).

In *City of Richmond v. J.A. Croson Co.*,[157] a majority of the Justices for the first time adopted strict scrutiny as the standard of review of race conscious remedial programs. In that case, the Justices struck down the city's thirty percent contract set-aside for minority businesses since the program was not narrowly tailored to achieve a compelling interest.[158] Statistics showing that even though the percentage of minorities in Richmond was over fifty percent, minority businesses since 1975 had received less than one percent of the public contracting dollars, and that the thirty percent target of set-aside affected only three percent of overall city contracting,[159] were not enough to convince the Court's majority that the program was genuinely designed to remedy the effects of past racial discrimination in a city which, as Justice Marshall reminded his colleagues, was the "former capital of the Confederacy."[160]

Since the minuscule participation of minority businesses in Richmond's public contracting was substantially indistinguishable from the nationwide plight of minority firms that called for remediation by Congress in the *Fullilove* case, Justice O'Connor, in her majority opinion, had to differentiate the remedial power of Congress from that of state or local governments.[161] "That Congress may identify and redress the effects of society-wide discrimination," she stated, "does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power. . . . To hold otherwise . . . would essentially entitle the

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[155] *Id.* at 282-83.

[156] *Id.* at 275-76.

[157] 488 U.S. 469 (1989).

[158] *Croson*, 488 U.S. at 507-08.

[159] *Id.* at 499-500.

[160] *Id.* at 528.

[161] *Id.* at 489-90.

States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1."[162]

The *Croson* Court explicitly kept the *Fullilove* interpretation of Congress' enforcement power intact. Moreover, a year later, the Court in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[163] took a much broader view of that power. The case involved a congressionally mandated policy of the Federal Communications Commission (FCC) which gave preference to minorities in licensing proceedings and in the transfer of a limited category of existing radio and television stations exclusively to minority-controlled firms.[164] Instead of articulating a remedial justification based on past racial discrimination, the agency claimed that an increase in minority ownership of stations was necessary to foster program diversity in broadcasting.[165] Feeling bound to give appropriate deference to the determinations of Congress, under the principles established in *Fullilove* and reaffirmed in *Croson*, the Court accepted the rationale of the agency.[166] More significantly, the Court adopted intermediate scrutiny as the standard of review of congressional enforcement action involving racial classifications.[167] Justice Brennan, writing for the majority, stated that

> benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[168]

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[162] *Id.* at 490 (emphasis in original).

[163] 497 U.S. 547 (1990).

[164] *Metro Broad.*, 497 U.S. at 556-58.

[165] *Id.* at 556.

[166] *Id.* at 566.

[167] *Id.* at 564-66.

[168] *Id.* at 564-65.

In a scathing dissent, supported by Chief Justice Rehnquist and Justices Scalia and Kennedy, Justice O'Connor denounced the review of the minority program under the standard of intermediate scrutiny. She argued that the proper review standard should be strict scrutiny, claiming that "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth,"[169] and that the FCC program was not designed to remedy the effects of racial discrimination—the only compelling interest recognized by "[m]odern equal protection doctrine."[170] Justice O'Connor insisted that the FCC program did not implicate the exercise of Congress' enforcement powers, and consequently, the *Fullilove* precedent was not applicable to the case.[171]

The dissenters were able to elevate the principles of their dissent to a majority position of the Rehnquist Court when they secured the fifth vote needed to muster a majority from Justice Thomas. In *Adarand Constructors, Inc. v. Pena,*[172] the Court invalidated, on equal protection ground, a congressionally established subcontracting program that gave a financial incentive to federal contractors who hired subcontractors "owned and controlled by socially and economically disadvantaged individuals."[173] The relevant federal statute authorized the United States Small Business Administration, the agency responsible for implementing the program, to presume without additional proof that members of certain racial and ethnic minorities are "socially . . . disadvantaged"[174] The Court, in a five to four decision, required Congress to demonstrate under the standard of strict scrutiny, that the program was narrowly tailored to further compelling governmental interests.[175] The Court insisted that any distinction drawn between state and federal classifications is "untenable" and is bound to "undermine[] the fundamental principle of equal protection as a personal right."[176]

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[169] *Id.* at 604-05 (O'Connor, J., dissenting) (quoting United States v. Paradise, 480 U.S. 149, 166 n.16 (1987)).

[170] *Id.* at 612 (O'Connor, J., dissenting). O'Connor maintained that the diversity rationale of the program did not measure up to a compelling interest to satisfy strict scrutiny. *Id.*

[171] *Id.* at 606-08. According to O'Connor, the *Fullilove* case involved a congressional act that required state and local government recipients of federal funds to award construction contracts to minority firms in order to remedy past racial discrimination. *Id.* at 606. The FCC program, by contrast, was devised and administered by a federal agency without any state involvement. Therefore, Congress had no occasion to exercise its section 5 powers directed against state action.

[172] 515 U.S. 200 (1995).

[173] 15 U.S.C. § 637(d)(1) (1994).

[174] 15 U.S.C. § 637(d)(3)(c) (1994).

Even though the Court in *Adarand* rendered a constitutional interpretation that, in its own words, "alter[ed] the playing field in some important respects,"[177] it failed to support the decision by compelling judicial precedents or to explain its disastrous impact on the enforcement powers of Congress. Instead, the Court, without any compunction, resorted to some new techniques of constitutional adjudication. The majority opinion, authored by Justice O'Connor, simply claimed that the decision was supported by three general propositions[178] —skepticism, consistency and congruence—allegedly established by the Court's prior decisions. To find these propositions, Justice O'Connor had to thread the needle with carefully selected plurality, concurring and dissenting opinions of Justices made in disparate contexts in prior cases.[179] As to the constitutional power of Congress, Justice O'Connor simply acknowledged that "various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority."[180] Then she cursorily stated that "[w]e need not, and do not, address these differences today."[181] The Justice should have admitted that by requiring Congress, the co-equal branch, to get its remedial legislation validated by a district court judge upon showing that the measure is narrowly tailored to achieve a compelling interest of the nation, the Court had struck at the heart of the congressional power.[182]

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[175] *Adarand,* 515 U.S. at 227.

[176] *Id.* at 235.

[177] *Id.* at 237.

[178] *Id.* at 223-24. "Skepticism" means any preference based on racial or ethnic criteria is suspect; "consistency" means racial classification must be strictly scrutinized regardless of whether it is benign or malignant; and "congruence" means that equal protection analysis under the Fifth Amendment and Fourteenth Amendment should be the same. *Id.*

[179] For example, the assortment of opinions that Justice O'Connor purports establish "skepticism" include the plurality opinion of Justice Powell in *Wygant,* and the dissenting opinion of Justice Stewart in *Fullilove. Id.* at 223. She also cited Chief Justice Burger's opinion in *Fullilove,* but without mentioning his emphatic statement that he rejected the proposition that the Constitution is colorblind. *Id.* She also cited *Hirabayashi v. United States,* which stated that "[d]istinction between citizens solely because of their ancestry are by their very nature odious to a free people" without mentioning the fact that the *Hirabayashi* decision upheld the internment of Japanese-Americans solely because of their race. *Id.* at 223-24 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

It was on the heels of the newly established equal protection principle of "nothing-so-special-about-the-congressional-power" that the Court in *City of Boerne v. Flores*[183] decided to invalidate the Religious Freedom Restoration Act (RFRA). In *Flores*, the Court not only asserted judicial supremacy in interpreting the Fourteenth Amendment, but also emphatically stated that the proposition that Congress' section 5 power is corrective or preventative, not definitional or substantive "has not been questioned."[184] But, as the foregoing analysis of prior cases demonstrates, such limiting dichotomies have been pointedly questioned and decisively discarded by the enlightened majorities of the Court several times in the past.

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[180] *Id.* at 230.

[181] *Id.* at 231.

[182] *Id.* at 243 n.1. (Stevens, J., dissenting) (asserting application of strict scrutiny fatal to government action). *See also* K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 403-12 (1997) (analyzing impact of strict scrutiny on congressional power).

[183] 521 U.S. 507 (1997).

[184] *Flores*, 521 U.S. at 525. To support its proposition that the congressional enforcement power is remedial and preventive in nature, the Court first cited *The Civil Rights Cases*. *Id.* at 524. The Court's "attachment to notions of judicial supremacy in constitutional interpretation [that] has clouded the Amendment's significance" is attributed in part to its reliance on "the dubious authority of the *Slaughter-House Cases* and *The Civil Rights Cases*." Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 101 (1995).

II. SELECTIVE READING OF HISTORY

As Justice Breyer stated, the Court could have decided the question presented in the *Flores* case just by reexamining its prior decisions concerning the Free Exercise Clause.[185] But the Court appeared to have made up its mind to turn back the clock of the section 5 jurisprudence to the inglorious days of *The Civil Rights Cases*.[186] However, the Court seemed to realize that its pronouncements on the scope of Congress' section 5 power are almost bereft of credible modern precedents. Therefore, the Court tried to make up the deficiency by invoking the spirit of the visionary framers of the Fourteenth Amendment.

In *Flores*, the Court made a microscopic search into the legislative history, hoping to expose some deep fault line in "the design of the Amendment and the text of § 5"[187] in order to support its conclusion that Congress possessed no "substantive, non-remedial power under the Fourteenth Amendment."[188] The Court "discovered" that the initial draft proposal of the Amendment reported to the House of Representatives by Representative John Bingham of Ohio on behalf of the Joint Committee on Reconstruction of the 39th Congress was heavily criticized by legislators, and that as a result, the drafters were ultimately forced to adopt a version that was drastically different from the initial draft proposal.[189] The Court ascribed so much significance to the circumstances that led to the change as to conclude that "[t]he objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress' enforcement power."[190] But the Court made a critical mistake. It misread the history of the Amendment and mischaracterized the revision of the initial draft proposal as its defeat or rejection, mostly relying on the statements of the opponents of the Amendment.[191] The Court made no reference to the countervailing views of those who framed and promoted the Amendment.

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[185] *Flores*, 521 U.S. at 566 (Breyer, J., dissenting). "I do not, however, find it necessary to consider the question whether . . . § 5 of the Fourteenth Amendment would authorize Congress to enact the legislation before us." *Id.* (Breyer, J., dissenting).

[186] 109 U.S. 3 (1883). The *Flores* Court successfully resurrected the holding of *The Civil Rights Cases* that Congress' section 5 power was strictly limited to "corrective legislation," and that it did not extend to legislation of direct and primary character. *Flores*, 521 U.S. at 525 (citing *The Civil Rights Cases*, 109 U.S. at 13-15).

[187] *Id.* at 519.

[188] *Id.* at 527.

[189] *Id.* at 520-22.

A. *What Really Happened in the 39th Congress*

The initial draft proposal reported by Mr. Bingham read:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[192]

The proposal naturally engendered debate which was "of a general and uninteresting nature with the exception of the speech by Mr. Hale, of New York, who declared that the tenor and effect of the [proposal] was to bring about a more radical change in the system of government."[193] He asserted that the proposal "is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead."[194] Representative Rogers, a minority member of the Reconstruction Committee, and few others spoke against the proposal.[195]

Representative Bingham dismissed the suggestion that the purpose of the proposal was to weaken the constitutional structure.[196] He stated that the only purpose of the proposal was to authorize Congress to enforce the Bill of Rights.[197] He pointed out that such enforcement power in the national government was particularly needed in light of the Supreme Court's decision in *Barron v. Mayor of Baltimore*[198] that the Bill of Rights was not binding on or applicable to the States.[199] Representative Woodbridge and several others strongly supported the Bingham proposal.[200]

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[190] *Id.* at 520.

[191] *Id.* at 521-22.

[192] CONG. GLOBE, 39th Cong. 1st. Sess., 1034 (1866).

[193] HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 57 (1908).

[194] CONG. GLOBE, 39th Cong., 1st. Sess., 1063 (1866).

[195] *Id.* at 1120-23.

After three days of debate, the House agreed to a motion made by Representative Bingham to postpone further consideration of the proposal until April 1866.[201] But the Court in *Flores* characterized the deferment as a defeat or rejection of the proposal.[202] The Court cited press reports that speculated regarding the possible demise of the proposal.[203] It is especially significant that the Court quoted the statement of Representative Farnsworth of Illinois that the draft proposal was "given its quietus by a postponement for two months, where it slept the sleep that knows no waking."[204] The Court's assertion that the draft proposal was defeated is a mischaracterization of what actually transpired in the House.

Representative Bingham, the author of the proposal and the Fourteenth Amendment recounted the events that led to the postponement:

> The amendment [as reported in February, 1866] never

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[196] *Id.* at 1089.

[197] *Id.* at 1090.

[198] 32 U.S. (7 Pet.) 243 (1833). Chief Justice Marshall in *Barron* stated: "These amendments [to the Constitution] contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." *Barron*, 32 U.S. (7 Pet.) at 250.

[199] CONG. GLOBE, 39th Cong., 1st. Sess., 1088-94 (1866).

[200] *Id.* at 1088. Representative Woodbridge stated that the proposal was necessary to empower Congress to secure by legislation the privileges and immunities guaranteed to every citizen under the Constitution. *Id.*

[201] *Id.* at 1095.

[202] *Flores*, 521 U.S. at 521-22. The court also wrongly stated that "the House voted to *table* the proposal until April." *Id.* at 521 (emphasis added). The motion to table was in fact defeated.

[203] *Id.* at 522.

[204] CONG. GLOBE, 42d Cong., 1st Sess., app. at 115 (1871).

> was rejected by the House or Senate. A motion was made to lay it on the table, which was a test vote on the merits of it, and the motion failed—only forty-one for the motion, and one hundred and ten against it. I consented to and voted for the motion to postpone it till the second Tuesday of April. Afterward, in the Joint Committee on Reconstruction, I introduced [the final] amendment, in the precise form, as I have stated, in which it was reported, and as it now stands in the Constitution of my country.[205]

Bingham made this clarification as an immediate and direct response to Farnsworth's insinuation that the postponement was tantamount to rejection of the proposal.[206] While the Court enthusiastically quoted Mr. Farnsworth, it never even mentioned the authentic account of history given by Bingham.[207] There are good reasons for not accepting Farnsworth's claim at its face value. First, Farnsworth was making the claim in 1871, long after the adoption of the Fourteenth Amendment, in the context of the debate on the "bill to enforce the Fourteenth Amendment," known as the Ku Klux Klan Act (KKK Act) in the 42d Congress.[208] Second, some of the legislators who made the rejection claim they did so not only to show that Congress had no power to enact the KKK Act under the Amendment, but also to place on the record for the benefit of the posterity their own interpretation of the scope of the Amendment.[209] Third, the 42d Congress rejected the claim

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[205] CONG. GLOBE, 42d Cong., 1st Sess. app. at 83 (1871).

[206] *Id.*

[207] *Flores*, 521 U.S. at 520-22.

[208] The membership and composition of the 42d Congress was substantially different from those of the 39th Congress which adopted the Amendment.

[209] CONG. GLOBE, 42d Cong., 1st Sess. app. at 153 (1871). For instance, Representative Garfield of Ohio who subscribed to the "rejection theory" and sought to amend the KKK Act stated:

> I have made these criticisms, not merely for the purpose of securing such an amendment to the section, but because I am unwilling that the interpretation which some gentlemen have given of the constitutional powers of Congress shall stand as the uncontradicted history of this legislation. . . . It is against a dangerous and unwarranted interpretation of the recent amendments to the Constitution that I feel bound to enter

of Farnsworth and others that Congress was not empowered by the Fourteenth Amendment to enact the KKK Act.[210] Farnsworth's scathing criticism of the KKK Act was based on his belief that it would "obliterate State lines and abolish State constitutions and State legislatures, and centralize all the power of these states of ours in one grand despotic, central Government at Washington. . . ."[211] In his opinion, the first section of the Fourteenth Amendment requires no enforcement legislation, since "it is a law unto itself; and the courts can execute it."[212] But not many of his colleagues accepted his views. Finally, Farnsworth's argument that the Fourteenth Amendment did not empower Congress to enact affirmative legislation to protect the civil rights, immunities and privileges of persons and citizens of the several states was patently inconsistent with his views on the subject when Congress reenacted the Civil Rights Act of 1866 with the sole purpose of saving it from the blemish of unconstitutionality. Farnsworth voted for the Civil Rights bill with the full realization that it was direct and affirmative legislation of Congress enacted pursuant to its Fourteenth Amendment enforcement powers. But in the 42d Congress, Farnsworth stated that his vote on the Civil Rights bill was an aberration.[213] In light of the foregoing facts,

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my protest.

Id.

[210] CONG. GLOBE, 42d Cong., 1st Sess. 521 (1871). Farnsworth specifically opposed section 3 of the KKK Act, which obligated the President of the United States to employ militia and land and naval forces to suppress insurrection, domestic violence or combinations that deprive any portion or class of people of their rights and privileges, and where the constituted authorities of the state fail to protect them either by "inability, neglect or refusal" or fail or neglect to apply to the President for assistance-conditions that would be "deemed a denial by the state of the equal protection of the laws to which they are entitled under the Fourteenth Amendment." CONG. GLOBE, 42d Cong., 1st Sess. app. at 114. A motion was made by Representative Holman to strike out section 3, but the motion was defeated by a vote of 115 to 88. Mr. Farnsworth voted for the motion. CONG. GLOBE, 42d Cong. 1st Sess. 521 (1871).

[211] CONG. GLOBE, 42d Cong., 1st Sess. app. at 117 (1871).

[212] *Id.*

[213] *Id.* at 116. Representative Farnsworth's denunciation of the congressional power during the debate in the 42nd Congress was totally incompatible with his supporting vote for the Civil Rights Bill of 1866 which undoubtedly was an affir-

Bingham's version of the history of the Fourteenth Amendment commands more credibility and authenticity than that of Farnsworth.

No one can deny that the consideration of the initial draft was postponed, and it was not called up for debate until May of 1866. It is even true that a few well-meaning members of the House believed that the postponement was tantamount to rejection. But placing undue emphasis on the rejection theory for the purpose of engrafting preferred interpretations on the Fourteenth Amendment is a mistake in light of the fact that Congress ultimately adopted the Bingham proposal in substance, with modifications in form only.[214] Sections 1 and 5 of the Fourteenth Amendment, which espoused the Bingham draft proposal read:

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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mative legislation to protect the equal rights and privileges of all persons within the jurisdiction of all the States. After admitting the inconsistency, he rationalized his vote on the Civil Rights Bill thus:

> I had given votes and done things during my twelve years' service in the House of Representatives which I cannot defend. . . . We passed laws, Mr. Speaker, and the country knows it, which we did not like to let go to the Supreme Court for adjudication. And I am telling no tales out of school. Since the adoption of this Amendment, because of scruples in regard to the constitutionality of the Civil Rights Bill we have reenacted it.

Id.

[214] FLACK, *supra* note 193, at 65. Flack noted that:

> [Bingham] exercised all the ingenuity of his legal and astute mind to put his cherished scheme into such form as to secure its adoption by making it acceptable to his colleagues. He did not make it weaker, as he himself stated at a subsequent time, but stronger, though it was in a form that seemed less objectionable.

Id.

> § 5. Congress shall have power to enforce this article by appropriate legislation.[215]

In addition to creating national citizenship, section 1 guarantees and secures privileges and immunities, due process, and equal protection of the laws. Clearly, in matters of civil rights and liberties, section 1 is much stronger than the initial Bingham proposal. However, the form of the proposal was changed from the positive "Congress shall have power" to enact "necessary and proper" legislation, to the negative, "No state shall make or enforce any law." This change provided the basis for the argument that the initial proposal would have empowered Congress to initiate original and positive legislation, but by virtue of the negative language of section 1, Congress can enact only corrective measures in response to unconstitutional state legislation. The argument is patently illogical because section 5 grants positive legislative authority to Congress to enforce by appropriate legislation the rights guaranteed by section 1. Demonstrating the fallacy of pigeon-holing congressional power to corrective legislation, Jacobus ten Broek has stated that "considering Sections 1 and 5 literally and grammatically, the final so-called negative form has virtually the same meaning as the earlier and abandoned positive form, unless we are to conclude that section 5 is utterly pointless, a mere redundancy in the Constitution."[216]

The framers of the Fourteenth Amendment consistently maintained that the principles and goals embodied in the original Bingham proposal were preserved and strengthened by its transformation from the affirmative to the negative form. Bingham stated on February 28, 1866, that the whole purpose of his proposal was "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the Bill of Rights as it stands in the Constitution today."[217] He asserted that making the Bill of Rights binding on the States was "essential to the unity of the Government and the unity of the people [and to assure] that all persons, whether citizens or strangers, within this land shall have equal protection in every State in this Union in the rights of life and liberty and property."[218]

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[215] U.S. CONST. amend. XIV, §§ 1, 5.

[216] JACOBUS TEN BROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 205 (1951). ten Broek pointed out that the states can deny equal protection and other rights by simple inaction. *Id.* In such a case, Congress may not have a state action to correct. *Id.* Further, if the sole purpose of section 5 is to enact corrective legislation, Congress need not legislate to nullify an unconstitutional State act because it would be nullified by the judiciary. *Id.* ten Broek also emphasized the elementary duty of the governments, state and national, to afford protection to citizens under the Equal Protection Clause. *Id.*

The framers emphatically reiterated and reaffirmed the very same purpose when they presented the revised proposal, as emerged in sections 1 and 5 of the Fourteenth Amendment. Bingham declared in no uncertain terms that the revised proposal gave power to Congress "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[219] Opening the debate on the revised proposal, Representative Stevens, co-chair of the Committee on Reconstruction, stated that the object of the proposal was to make the rights contained in the Constitution and the Declaration of Independence binding on States by congressional legislation.[220] Echoing the general views of the supporting legislators, Representative Broomall of Pennsylvania declared that the purpose of the revised proposal was "to give power to the Government of the United States to protect its own citizens within the states, within its own jurisdiction."[221]

Presenting the proposal on behalf of the Reconstruction

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[217] CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

[218] *Id.* at 1090.

[219] *Id.* at 2542.

[220] *Id.* at 2459. Stevens stated that provisions of the revised proposal (sections 1 and 5 of the Fourteenth Amendment) are all in the Constitution and in the Declaration of Independence. *Id.* "But the Constitution limits only the action of Congress, and is not a limitation on the states." *Id.* This Amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far as that the law which operates upon one man shall operate *equally* upon all. *Id.*

[221] *Id.* at 2498.

Committee to the Senate, Senator Howard of Michigan stated that the "great object of the first section of [the] Amendment [was] . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees [of the Bill of Rights]" and that the fifth section was "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[222] Senator Howard's statement about the scope of the Amendment was the authoritative interpretation of the Reconstruction Committee, and it was not challenged by any member of the minority. "[I]n fact, the minority opposed the Amendment for the very reasons which [Howard] gave in support of it. . . ."[223]

Thus, the change in the form of the Bingham proposal from the affirmative "Congress shall have power" to the negative "No state shall deny" did not signify any radical change in its substantive content. Then what is the rationale for revising the format? Bingham gave a convincing and "truthful" explanation for the change during the debate on the KKK Act. First, he assumed full responsibility for writing the modified version "letter for letter and syllable for syllable." He then stated that the very idea of changing the form was derived from the United States Supreme Court decision in *Barron v. Mayor of Baltimore*,[224] in which a citizen whose property was taken by the city for public use without compensation was denied relief on the ground that the first eight amendments to the United States Constitution were inapplicable to states and local governments.[225] Most disturbing to Bingham was the statement in the opinion of Chief Justice Marshall in the case that "[h]ad the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention."[226] Following this suggestion, Bingham simply imitated the framers' language "letter for letter," just like in "no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts."[227] He was confident that the negative limitations on the states combined with the affirmative enforcement power granted by the fifth section of the Amendment would force the States to abide by the Bill of Rights of the Constitution.[228]

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[222] *Id.* at 2765-66.

[223] FLACK, *supra* note 193, at 87.

[224] 32 U.S. (7 Pet.) 243 (1833).

[225] *Barron*, 32 U.S. (7 Pet.) at 250.

Bingham's description of the ultimate objective of the creative drafting of the first section of the Amendment was corroborated by Senator Howard when he reported the provision to the Senate for the Reconstruction Committee. He stated in May, 1866, that the first section "would forever disable every one of them [States] from passing laws trenching upon [the] fundamental rights and privileges which pertains to citizens of the United States, and to all persons who may happen to be within their jurisdiction."[229]

B. *The Revision that Failed to Appease the Opponents*

The arguments and analyses of the opponents of the Fourteenth Amendment, more than anything else, conclusively proved that hardly any member of the Thirty-ninth Congress believed that the change in the form of the first section altered its meaning or substance. The crux of the opponents' argument, premised on the fear that the Amendment would shift the balance of legislative power from the States to the central government, continued unabated even after the transformation of the original Bingham proposal.

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[226] *Id.*

[227] CONG. GLOBE, 42d Cong., 1st Sess. app. at 83-85 (1871).

[228] *Id.*

[229] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Commentators overwhelmingly agree with the assessment that the framers intended to incorporate the Bill of Rights in the Fourteenth Amendment. *See* Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443, 449 (1996); *see also* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 106 (1986); Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEGAL HIST. 41, 41-42 (1996) (arguing that sponsors of Fourteenth Amendment incorporated Bill of Rights into Amendment); William E. Nelson, *The Role of History in Interpreting the Fourteenth Amendment*, 25 LOY. L.A. L. REV. 1177, 1177 (1992) (arguing that framers and those who ratified Fourteenth Amendment intended to incorporate Bill of Rights).

When the original proposal was reported to the House, Representative Andrew Rogers, ranking minority member of the Reconstruction Committee, opposed it as "despotic amendment[s]" designed as a move toward "centralization" of power at the expense of established laws and constitutional provisions of the states.[230] The tenor and substance of the opponents' arguments were identical. As the Court stated in *Flores*, the criticism of Representative Robert Hale of New York that the proposal envisioned "an utter departure from every principle ever dreamed of by the men who framed our Constitution" typified the views of the opponents.[231]

The theme and intensity of the opposition remained the same after the format of the Amendment changed from the affirmative "Congress shall have power" to the negative "No state shall deny." On the last day of the debate on the Amendment in the House, Rogers characterized the modified first section as a "programme of disunion" and denounced it with the following passionate language:

> [It is] most dangerous to liberty. It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.[232]

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[230] CONG. GLOBE, 39th Cong., 1st Sess. app. at 133-36 (1866).

[231] *Flores*, 521 U.S. at 521 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866)).

[232] CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866). Representative Shanklin also declared that the first section destroyed the rights which were vested in the states. *Id.* at 2500. Similarly, Representative Randall of Pennsylvania asserted that the first section attempted to "make an equality in every respect between the two races notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States." *Id.* at 2530.

The interpretation ascribed to the revised form of the Amendment by the opponents in the Senate was equally pessimistic. Senator Aaron Harding of Kentucky claimed that the Amendment "transfer[red] to Congress from the States all power of control over their own citizens" and "let Congress judge of [the citizens'] wants and what legislation should be enacted for their government."[233] Senator Thomas Hendricks of Indiana stridently criticized the Amendment and articulated his concerns about the fifth section:

> When the words [of section 5] were used in the amendment abolishing slavery they were thought to be harmless, but during this session there has been claimed for them such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed this provision is most dangerous. Without it the Constitution possesses the vitality and vigor for its own enforcement through the appropriate departments.[234]

Despite the virulent criticism of the opponents, both chambers of Congress, by overwhelming majority, adopted the revised Amendment. But the tirade against the alleged redistribution of powers between the states and the national government continued in the press and state legislatures across the country.[235] The issue became the centerpiece of the campaign against the Amendment's ratification. The southern rebellious states, as well as the states of Kentucky, Delaware, and Maryland, rejected the Amendment primarily out of fear that it would strip them of powers most vital to their safety and freedom and would shift those powers to the federal government.[236] The focus of the public debate preceding the ratification of the Amendment was succinctly identified by historian Horace Flack:

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[233] *Id.* at 3147.

[234] *Id.* at 2940.

[235] FLACK, *supra* note 193, at 140-210. Flack notes, for instance, that the *National Intelligencer* of Washington declared that section 5 of the Amendment would "result in an invasion of the power of the states to legislate"; the *Florida Union* had no doubt whatsoever that the Amendment would "destroy the old Constitution"; the *Louisville Journal* viewed the Amendment as a step toward centralization; and an editorial in the *World* concluded that the Amendment would transfer "municipal control of the state governments over their internal affairs into the hands of Congress." *Id.* at 152-57. Flack also discussed other journalistic judgments about the Amendment and quoted official statements of various state legislatures and governors concerning the Amendment. *Id.* at 140-210.

> It is a rather striking coincidence that the thoughtful men, North and South, regarded the first section, in connection with the fifth, as the most objectionable of the entire Amendment, for in it they saw the possibility, and no doubt the purpose, of a strong consolidated Federal Government, with greatly enlarged powers put into the hands of Congress.[237]

The foregoing history of the framing and adoption of the Fourteenth Amendment unequivocally demonstrates that the Supreme Court has vastly exaggerated the substantive significance of the drafting changes that the Amendment had undergone in the legislative process. The changes made to the format of the initial draft of the Amendment did not have such "a direct bearing on the central issue of defining Congress' enforcement power" as the *Flores* Court would have the country now believe.[238] Even more stunningly preposterous is the Court's assertion that "[t]he revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty and property."[239] In fact, the revised Amendment faced more virulent condemnation than the initial Bingham draft from the opponents of enhanced congressional power. But what really matters is the stark reality that the opponents of expansion of congressional power did not shape the Amendment; they only denounced it without having much impact on its adoption or ratification.

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[236] *Id.* at 204-05. The Southern rebellious states, with the exception of Tennessee, initially refused to ratify the Amendment mostly on the ground that it would undermine state autonomy in managing their political and civil responsibilities. *Id.* at 191-204. Apart from their basic objections against the first and fifth sections, those states were also concerned about the second, third and fourth sections of the Amendment which established the basis of representation in Congress by equalizing the votes of all citizens, disqualified state officials who participated in the rebellion from holding federal offices, and repudiated any federal obligation to pay any debt or obligation incurred in the aid of insurrection or rebellion. *Id.* at 201-03.

[237] *Id.* at 159-60.

[238] *Flores*, 521 U.S. at 520.

Even the opponents of the Amendment frankly accepted the verdict of the 39th Congress and the ratifying state legislatures. They finally conceded that they lost the legislative battle on the issue of state power and that Congress was vested with exclusive and unconditional power of enforcement under the Amendment. The Court could have come to grips with that fact just by continuing its reading of the statements of Representative Robert Hale of New York. The Court seemed to have no problem in believing Hale because it quoted him to establish that the Bingham draft proposal was defeated for the reason that it gave "Congress a power to intrude into traditional areas of state responsibility."[240] The Court in *Flores* stated: "Typifying these views [of the opponents of the Bingham proposal], Republican Representative Robert Hale of New York labeled the Amendment 'an utter departure from every principle ever dreamed of by the men who framed our Constitution.'"[241] It bears noting that almost a decade later, Hale was taken up on his statement by Representative Frick of Ohio during the debate on a civil rights bill in the 43rd Congress. Frick took the position that Congress under the Amendment had only the power to enact "corrective" legislation. Hale defended the position he took in the 39th Congress as follows:

> I well remember . . . that it was my fortune, standing alone in my party, to oppose the Fourteenth Amendment by my vote and by my voice, upon the ground, which seemed to me to be one I could not forsake, that it *did* change the constitutional powers of legislation of Congress, that it changed the theory

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[239] *Id.* at 523.

[240] *Id.* at 521.

[241] *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866)).

> of our Government, and introduced a range of legislation by Congress utterly lacking in the old Constitution or in any previous amendments to it except the thirteenth. I voted against the fourteenth amendment on that ground alone, fully conceding the propriety of the provisions of the article, except the last section, claiming that that section was to a certain extent a revolution of our form of government in giving Congress a control of matters which had hitherto been confined exclusively to State control. In the position I then took I certainly understood in the Thirty-ninth Congress that my friend from Ohio [Frick]. . . fully concurred. I understood that the entire body of his political associates on the other side of the House in that Congress concurred with me.[242]

Then Hale cited Chief Justice Marshall's opinion in *McCulloch v. Maryland* to support his contention that section 5 gave exclusive power to Congress, and not to the courts, to decide the appropriateness, fitness, and desirability of all the legislative measures that are conducive to the achievement of the Amendment's objectives.[243] Hale concluded his speech as follows:

> But in the present condition of the Constitution, with the grant made by the fourteenth amendment, I contend that it is not only within the power of this House, but that it is their duty to exercise appropriate legislation toward the end provided by that amendment just as much as if the language was "it shall be the duty of Congress to enforce by appropriate legislation" instead of saying "Congress may enforce."[244]

It is difficult to discern any reason for the Court's distorted reading of the history and rationale of the Amendment, other than its desire to wrestle away the enforcement powers of Congress. To achieve the objective, the Court needs to assume the role of the ultimate arbiter of federal-state conflicts that are certain to arise under its new construction of the Amendment.

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[242] CONG. GLOBE, 43d Cong., 2d Sess. 979 (1875).

[243] *Id.* at 980.

[244] *Id.*

The Court seems to be consciously reticent to the fact that the State's rights it seeks to protect were lost in three historic battles waged a century and a quarter ago in the cause of nationalization of the civil and political rights of United States citizens. The sequence and outcome of those battles have been summarized by Jacobus ten Broek thus:

> From the beginning, the program for the national protection of men in their civil rights encountered the destruction-of-federalism argument. The Thirteenth Amendment, the first constitutional expression of that program, was proposed, encountered the federalism objection, and was adopted anyway. Next, the civil rights bill, designed to implement the Thirteenth Amendment, had heaped upon it the same charge. It was adopted notwithstanding. Then, at last, came the Fourteenth Amendment. Created to accomplish what the Thirteenth Amendment had been designed to do but had failed to do because of the continuation of the federalism objection, intended to remove from the Civil Rights Act the constitutional doubts arising from the federalism objection to it, the Fourteenth Amendment itself, in turn, subjected to the very same criticism. Despite that criticism, it too was adopted.[245]

The efforts of the Court to reenact the old unholy battles and to resurrect the federalism argument would only make the Justices look like latter-day confederate statesmen. Even the shadow of the discredited legacy anywhere in the vicinity of the Supreme Court would make many segments of our society, especially the racial and ethnic minorities, extremely uncomfortable, and even restless.

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[245] TEN BROEK, *supra* note 216, at 203. ten Broek poignantly questioned the Supreme Court's role in undermining the effectiveness of the Fourteenth Amendment thus:

> Is it anything less than a colossal historic irony that, after three times adopting a program to nationalize the natural rights of men—twice by solemn constitutional amendment and once by legislative enactment over a presidential veto—each time over the bitter criticism that it would destroy the federal system, the nation should then—particularly through the instrumentality of the Supreme Court—without the benefit of formal repeal, adopt the objection and reject the program by a refusal to carry it out?

Id. at 204.

C. *Judicial Enforcement Not Contemplated*

Even if it is assumed that the Amendment somehow subordinated national rights to the States' rights, it need not necessarily follow that whatever national rights secured by the Amendment are to be enforced by the judiciary. But the Court in *Flores* came down to the most indefensible conclusion that "[a]s enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing"[246]—a conclusion that automatically anoints the Court as the paramount enforcer of the Amendment. This is nothing but a travesty of the principle of constitutional interpretation. It should be plainly obvious to the Court not only that the Amendment is in form and substance so remarkably different from the Bill of Rights as to make it non-self-executing, but that the Amendment's unique history demonstrates its drafters' desire to purposely withhold enforcement power from the judiciary. None of the Amendments in the Bill of Rights is accompanied by a custom-made enforcement provision like those that accompany the Civil War Amendments. Let us defer the question whether the enforcement provision of the Fourteenth Amendment could work in tandem with the traditional form of judicial enforcement—the hallmark of the original Bill of Rights. Most troubling is the Court's failure even to acknowledge, anywhere in the discussion designed to justify the judicial aggrandizement of the enforcement power, the universally known fact that the drafters of the Amendment intended to lodge that power in the Congress, and not in the judiciary.

The Fourteenth Amendment, and indeed the other two Civil War Amendments, were conceived and adopted in an atmosphere of intense hostility and distrust between the Congress and the Supreme Court. The period of suspicion was ushered in by the Court's *Dred Scott v. Sanford*[247] decision in which Chief Justice Roger Taney degraded the entire black population by characterizing them as "so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[248] It was later conclusively established that the Court was acting in collusion with President Buchanan who was elected with the strong support of the slave owners.[249] The reaction of Congress to the *Dred Scott* decision was swift and extraordinary. Senator Seward of New York called upon the people of the United States to defy the unconstitutional and abhorrent principle of the decision that one man can own another man.[250] He also threatened to "reorganize the Court and thus reform its political sentiments and practices, and bring them into harmony with the Constitution and the laws of nature."[251]

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[246] City of Boerne v. Flores, 521 U.S. 507, 524 (1997). The court immediately added: "The power to interpret the Constitution in a case or controversy remains in the Judiciary," suggesting the primacy of judicial enforcement of the Amendment. *Id.*

The institutional friction between the Court and Congress intensified when the Court became increasingly involved in Reconstruction politics. In the political conflict between President Andrew Johnson and the abolitionist Congressional Republicans, the Court was seen as taking sides with the President. The Justices refused to sit in circuit courts in southern states which were governed by military authorities. Such refusal to hold court in Virginia even prevented the trial of Jefferson Davis for treason. In April, 1866, the Court, in *Ex parte Milligan*,[252] held that Congress had no power to establish military commissions for the trial of civilians who participated in insurrections in violation of the laws of war, so long as the civil courts were open and functioning.[253] The Reconstructionists, denouncing the decision, alleged "that the Court had [then] joined hands with President Johnson in an effort to destroy the Congressional plan for Reconstruction."[254] The major newspapers castigated the Court for supporting the advocates of slavery and rebellion.[255]

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[247] 60 U.S. (19 How.) 393 (1856).

[248] *Dred Scott*, 60 U.S. (19 How.) at 407.

[249] GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 474 (1912).

[250] CONG. GLOBE, 35th Cong., 1st. Sess. 943 (1858). Senator Seward stated that the "people of the United States never can, and they never will, accept principles so unconstitutional and so abhorrent. Never, never!" *Id.*

[251] *Id.*

[252] 71 U.S. (4 Wall.) 2 (1866).

President Johnson endorsed the *Milligan* decision as the vindication of his desired policy to dismantle the military governments in the South, but the Reconstructionists in the Congress called for measures to neutralize the power of the Court. Representative Thaddeus Stevens of Pennsylvania saw the peril of murderers "being turned loose under the *Milligan* decision."[256] Representative John Bingham of Ohio proposed to "[sweep] away at once the Court's appellate jurisdiction in all cases."[257] Bingham even wanted to restore the power of the free people "by procuring a further constitutional amendment and ratifying the same, which will defy judicial usurpation by annihilating the usurpers, in the abolition of the tribunal itself."[258] Only the Democrats, who opposed the reconstruction policies of Congress expressed any support for the *Milligan* decision.[259]

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[253] *Milligan*, 71 U.S. (4 Wall.) at 121.

[254] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 428 (1922).

[255] *Id.* at 429-32. The *New York Times*, for instance, alleged in an editorial that the Supreme Court threw "the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it." *Id.* at 429. *The Cleveland Herald* opined that the *Dred Scott* and *Milligan* decisions were political acts in which the Supreme Court had "gone the farthest to sustain slavery and to paralyze the arm of our Government in putting down the rebellion. . . . " *Id.* at 432. The *New York Herald* demanded "reconstruction of the Supreme Court" to make it adaptable to the paramount decisions of the war. *Id.* at 431.

[256] CONG. GLOBE, 39th Cong., 2d Sess. 251 (1867).

[257] *Id.* at 249.

[258] *Id.* at 502. Representative Thomas Williams of Pennsylvania wanted a law to mandate unanimous consent of the Justices of the Court for rendering opinions on constitutional questions. *Id.*

[259] *Id.* at 269. For instance, Senator Reverdy Johnson praised the *Milligan* decision as "not to be surpassed . . . by any opinion pronounced by any Judge in

The savage criticism by Congress and the press did not change the political and philosophical proclivities of the Court. In 1866, the Court rendered two decisions which further infuriated the congressional Reconstructionists who were resolved to treat as traitors all participants and sympathizers of the confederate forces and to deprive them of their rights and liberties as punishment. In *Cummings v. Missouri*,[260] the Court invalidated a state law that required individuals who wished to engage in certain professions to take an oath that they had not aided, supported or favored the cause of the Confederacy in word or deed.[261] Likewise, in *Ex parte Garland*,[262] the Court struck down an act of Congress which required a similar loyalty oath as a condition for admission to the practice of law before the Court.[263] In both cases, the Court found that the loyalty oaths constituted punishments violative of the constitutional prohibition against bills of attainder[264] and *ex post facto* laws.[265]

These decisions only helped to reinforce the belief of the Republican majority of the Congress that the Supreme Court could not be counted on for fair and effective enforcement of their reconstruction laws.[266] The Reconstructionists in Con-

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any former case in that tribunal." *Id.* There were several newspapers and periodicals that characterized the *Milligan* decision "as a triumph of the rule of law over lawlessness." WARREN, *supra* note 254, at 434.

[260] 71 U.S. (4 Wall.) 277 (1866).

[261] *Cummings*, 71 U.S. (4 Wall.) at 324-32.

[262] 71 U.S. (4 Wall.) 333 (1866).

[263] *Ex parte Garland*, 71 U.S. (4 Wall.) at 379-81.

[264] U.S. CONST., art. I, § 10, cl. 1.

[265] U.S. CONST. art. I, § 9, cl. 3 (prohibiting passage of ex post facto laws by Congress). *See also* U.S. CONST. art I, § 10, cl. 1 (prohibiting passage of ex post facto laws by states).

[266] CONG. GLOBE, 40th Cong., 2d Sess. 1883-84 (1868). For example, Representative Robert Schneck of Ohio stated, "Sir, I have lost confidence in the majority of the Supreme Court of the United States. . . . And I hold it to be not only my right but my duty, as a Representative of the people, to clip the wings of that court wherever I can. . . ." *Id.* Representative John Bingham stated, "[t]he Supreme Court, sir, disgraced not only itself as a tribunal of justice, but it disgraced our common humanity, when it mouthed from that high seat sacred to justice the horrid blasphemy that there were human beings either in this land or in any land who had no rights which white men were bound to respect." *Id.* at

gress sought to devise legislative measures to counteract the Court's unfavorable decisions or to diminish its opportunity to strike down federal legislation on constitutional grounds. In January, 1867, Representative George Boutwell of Massachusetts introduced a bill to nullify the Court's decision in the loyalty cases, by requiring all courts not to permit persons suspected of disloyalty to practice law.[267] In 1868, the House passed a bill, reported by the Judiciary Committee, that required the concurrence of two-thirds of the Justices of the Supreme Court to sustain any lower court decision invalidating an act of Congress on constitutional grounds.[268] During the consideration of the bill, Representative Williams of Pennsylvania even tried, unsuccessfully, to amend it to require unanimous concurrence of all the Justices of the Court to validate a decision of unconstitutionality.[269]

Most noteworthy was the speech of Representative Bingham, in support of legislation imposing super-majority requirements on the Supreme Court.[270] He asserted that the *Dred Scott* decision, which he called a horrid blasphemy and a disgrace to humanity,[271] provided a substantial reason for the legislation.[272] He went on to express his sense of outrage

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[267] CONG. GLOBE, 39th Cong., 2d Sess. 646-73 (1867). The Boutwell Bill was, however, not adopted by Congress. *Id.*

[268] CONG. GLOBE, 40th Cong., 2d Sess. 478-89 (1868). The Bill, which was adopted by a vote of 116 to 39, provided:

> That if any circuit or district court of the United States shall adjudge any act of Congress to be unconstitutional or invalid, the judgment, before any further proceedings shall be had upon it, shall be certified up to the Supreme Court of the United States and shall be considered therein, and if upon the consideration thereof two-thirds of all the members of the Supreme Court shall not affirm said judgment below, the same shall be declared and held reversed.

Id. at 489.

[269] *Id.* Representative Williams's amendment was defeated by a vote of 124 to 25, but among those who voted *for* the amendment was Representative John Bingham of Ohio, the author of the Fourteenth Amendment. *Id.*

[270] *Id.* at 484.

[271] *Id.* at 483.

[272] *Id.* at 484.

against the Supreme Court:

> The rights of the people of this country are to be respected, and those whom they send to this Congress are clothed by the Constitution with the power to compel even the Supreme Court to respect those rights, and to that end, if need be, to reduce that court to a single person, if you please, and thereby compel unanimity at least in a decision which may deny the people's rights and violate the people's laws.[273]

Bingham's aversion to what he perceived as judicial intransigence was consistently stated in uncompromising terms. But his views also reflected the attitude of the overwhelming majority of the members of the Reconstruction Congresses who "did not trust the judiciary in general and the Supreme Court in particular, either before or after the passage of the resolution submitting the proposed [Fourteenth] Amendment to the states."[274] The fact that this serious lack of confidence in the judiciary had animated the design of the Amendment's enforcement provision should be given due consideration in interpreting its scope and meaning. But the Supreme Court in *Flores* did not consider this critical fact even worth mentioning.

Such glaring omission made the Court's interpretation more than incomplete and non-contextual. It provided a solid reason to impugn the integrity of the interpretation itself because the omission was not the result of any innocent judicial oversight. The Court thoroughly combed the legislative history of the Amendment to cherry pick favorable portions of congressional speeches to support its construction of the federal-state balance of power allegedly envisioned by the Amendment's drafters and supporters. It would have been difficult for the Court to miss the long and colorful speeches of Bingham and others that highlighted the celebrated interbranch feud, even if one assumes that the Justices needed to study them afresh to be informed of such well-known historical facts. Therefore, it is reasonable to conclude that the Court deliberately avoided those facts because they directly undercut its claims that the rights guaranteed by the Amendment are "self-executing" and the primary vehicle for their vindication is the judiciary.[275]

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[273] *Id.* at 483.

[274] *See generally* ROBERT HARRIS, THE QUEST FOR EQUALITY 53-54 (1960) (suggesting that any constitutional norm that is entirely self-executing is inherently unsound).

III. THE DOMINO EFFECT OF CITY OF *BOERNE V. FLORES*

City of Boerne v. Flores is not just another run-of-the-mill decision about the Fourteenth Amendment. Its ripple effect on congressional power to remedy long-standing societal problems of discrimination and prejudice has been swift and debilitating. Within six weeks after the *Flores* decision, a federal district court in Ohio ruled that the provisions of the Americans with Disabilities Act (ADA)[276] and the Rehabilitation Act,[277] which required employers to reasonably accommodate disabled individuals qualified for the relevant job,[278] were not validly enacted in exercise of Congress' enforcement power under the Fourteenth Amendment and, therefore, not enforceable against state employers who are protected by the Eleventh Amendment's sovereign immunity.[279] The district court held that the challenged provisions constituted "a substantial infringement on a traditional area of state sovereignty"[280] because they created a substantive right to preferential treatment for disabled employees, forced the states to bear the costs of the new entitlement, and interfered with the freedom of the states to set qualifications for their employees—all without being "counterbalanced by the goal of preventing or remedying constitutional violations."[281] According to the district court, the ADA failed the *Flores* test for valid congressional enforcement legislation since "[t]he accommodation provisions require no congruity between the obligations of the state employer under the accommodation provisions and the injury of discrimination they are supposed to prevent.[282]

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[275] *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-14 (1978).

[276] 42 U.S.C. §§ 12101-12213 (1994).

[277] 29 U.S.C. §§ 791-94 (1994).

[278] 42 U.S.C. § 12112(a)-(b) (1994).

[279] Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1174-76 (S.D. Ohio 1997). *Flores* was decided on June 25, 1997, and *Nihiser* was decided on August 6, 1997. At least two other courts agreed with the *Nihiser* decision. *See* Garrett v. Board of Trustees of Univ. of Ala., 989 F. Supp. 1409, 1410 (N.D. Ala. 1998) (holding sovereign immunity of states intact after passage of ADA and Rehabilitation Act); Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 458 (E.D.N.C. 1997) (stating that "Congress is outside of the Enforcement Clause authority in attempting to abrogate North Carolina's sovereign immunity with the ADA"). The *Nihiser* court noted the Supreme Court decision in *Seminole Tribe v. Florida*, which held that Congress has no power to abrogate states' Eleventh Amendment immunity under the Commerce Clause, and stated that "the only currently recognized authority for Congress to abrogate states' sovereign immunity . . . consists of Congress' enactment of legislation pursuant to its enforcement powers under § 5 of the Fourteenth Amendment of the United States Constitution." *Nihiser*, 979 F. Supp. at 1170. By virtue of the *Seminole Tribe* decision, the federal courts have rendered a number of federal statutes, including

The ADA is the "new bill of rights"[283] of over forty-three million Americans who are physically or mentally disabled. After extensive hearings and investigations, Congress found that disabled individuals are a "discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond [their] control . . . [and] stereotypic assumptions."[284] To provide "legal recourse to redress such discrimination,"[285] Congress enacted the ADA invoking "the sweep of [its] authority, including the power to enforce the fourteenth amendment and to regulate

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those enacted to combat discrimination, inapplicable to states. *See* Larry v. Board of Trustees of the Univ. of Ala., 975 F. Supp. 1447, 1450 (N. D. Ala. 1997) (holding that Equal Pay Act "is not premised upon intentional discrimination" and therefore Congress lacked power to abrogate states' immunity and enforce Act against States); MacPherson v. University of Montevallo, 938 F. Supp. 785, 789 (N.D. Ala. 1996) (holding that Age Discrimination in Employment Act, enacted under Congress' Commerce Clause power, did not abrogate states' immunity, and therefore Act was not enforceable against states).

[280] *Nihiser*, 979 F. Supp. at 1176.

[281] *Id.*

[282] *Id.* at 1174.

[283] Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 116-17 (1990).

[284] 42 U.S.C. § 12101(a)(7) (1997).

[285] 42 U.S.C. § 12101(a)(4) (1997).

commerce."[286] Congress explicitly stated that the states would not be immune from liability for violations of the ADA.[287]

Prior to the Supreme Court decision in *Flores*, federal courts had little difficulty in finding that the ADA was a valid exercise of Congress' enforcement power and that the accommodation provisions of the statute were rationally related to the objectives of the Equal Protection Clause.[288] But the *Flores* decision seems to change that for some courts. In addition to the question of Eleventh Amendment immunity, the ADA allegedly raises the issue of interpretive superiority very similar to the one raised by the Religious Freedom Restoration Act. In its 1985 decision in *City of Cleburne v. Cleburne Living Center, Inc.*[289] the Supreme Court ruled that mental disability is not a suspect or quasi-suspect classification that triggers heightened judicial scrutiny.[290] The Court specifically stated that mentally disabled people were not subjected to "continuing antipathy or prejudice"[291] nor were they politically powerless, so as to warrant "intrusive oversight by the judiciary."[292] Since Congress in the ADA made the specific finding that disabled individuals are a "discrete and insular minority,"[293] and have historically been politically powerless, it is being argued in recent cases, at times successfully, that the ADA imposes on courts the standard of strict or intermediate scrutiny for review of disability classifications. At least two federal district courts have ruled after *Flores* that Congress has no power to declare in the ADA that disabled people are a class entitled to more Fourteenth Amendment protection than what was granted by the Supreme Court in *Cleburne Living Center.*[294]

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[286] 42 U.S.C. § 12101(b)(4) (1997).

[287] 42 U.S.C. § 12202 (1997). This satisfied the judicially imposed requirement that Congress should abrogate the Eleventh Amendment immunity clearly and explicitly. Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996).

[288] *Nihiser*, 979 F. Supp. at 1173. The court stated that "[a]lmost every court which has addressed the issue to date has concluded that the ADA and the Rehabilitation Act are statutory schemes which are rationally related to the Equal Protection Clause and plainly adapted to the enforcement of that Clause." *Id.* The court then cited several circuit court and district court decisions that supported this proposition. *Id. See also* Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 201-02 (1992) (stating that prior decisions of Supreme Court reinforced validity of Congress' power to enforce provisions of ADA under Fourteenth Amendment).

[289] 473 U.S. 432 (1985).

[290] *Cleburne Living Ctr.*, 473 U.S. at 442-46.

[291] *Id.* at 443.

[292] *Id.* In a subsequent case, the Court reaffirmed its position that classification based on mental disability was only subject to the rational basis test. Heller v. Doe, 509 U.S. 312, 319-21 (1993).

[293] 42 U.S.C. § 12101(a)(7) (1994).

The judicial decisions invalidating the reasonable accommodation provisions of the ADA stunningly expose several hidden weaknesses of the *Flores* jurisprudence. The ADA decisions graphically illustrate that the drawing of the contours of congressional power on the basis of a remedial/non-remedial distinction is nothing more than a drawing in the sand. The political branches of our national government and forty-three million disabled Americans hailed the ADA as a consummate remedial legislation. But the term remedial is devoid of its natural and ordinary meaning if the *Flores* decision permits federal judges to rule that the ADA is not remedial enough for enforcement against the states.[295]

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[294] *Brown*, 987 F. Supp. at 458. The court stated that:

> Congress cannot force the courts to adopt a new regime vis-a-vis the classification of individuals with disabilities. . . . Because the Supreme Court held in *Cleburne* that disabled people are not a class entitled to increased Fourteenth Amendment protection, this Court cannot now decide that Congress has the power to declare otherwise in the ADA. Thus Congress is outside of its Enforcement Clause authority in attempting to abrogate North Carolina's sovereign immunity with the ADA.

Id. See also Bartlett v. New York State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997) ("Hence, at the very least, *Boerne* [*v. Flores*] tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause.").

[295] *Garrett*, 989 F. Supp. at 1410-11. In *Garrett*, the court stated that "Congress cannot stretch Section 5 and the Equal Protection Clause of the Fourteenth Amendment to force a state to provide allegedly *equal* treatment by guaranteeing *special* treatment or 'accommodation' for disabled persons, as is purportedly required of states in the two statutes in question." *Id.* at 1410. *See Nihiser*, 979 F. Supp. at 1174 (stating that in enacting accommodation provisions "Congress created a substantive right to preferential treatment where no such right previously existed under the Equal Protection Clause").

The *Nihiser* line of cases also demonstrates the irrelevance of congressional fact-finding on significant national issues to constitutional interpretation under the *Flores* regime. The legislative findings in the ADA that disabled persons are subjected to a history of purposeful unequal treatment should have been conclusive to justify the accommodation provisions of the ADA.[296] Similarly, congressional determination that disabled persons constitute a discrete and insular minority, contrary to the *Cleburne Living Center* finding that they are not, should be accepted as a finding concerning a constitutional fact[297] made by the political branch "far better equipped than the Courts accurately to make such findings."[298] But the *Flores* decision provided the opportunity to the opponents of the ADA to argue that the congressional findings should not overrule the Supreme Court on the issue of the proper level of scrutiny of disability classifications.[299]

Finally, the *Nihiser* line of cases serve as warning signals to Congress and its constituents, especially racial minorities, women, and the disabled, that the *Flores* decision has deeper meaning than what appears on the surface. One commentator has argued that the "decision marks the beginning of a new relationship between Congress and the Supreme Court."[300]

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[296] Elizabeth Welter, Note, *The ADA's Abrogation of Eleventh Amendment State Immunity As a Valid Exercise of Congress' Power to Enforce the Fourteenth Amendment*, 81 MINN. L. REV. 1139, 1166-67 (1998). Accordingly, "[t]he existence of societal discrimination against disabled individuals thus provide the justification for Congress to use its enforcement power to require states to accommodate disabled individuals." *Id.* at 1170.

[297] Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 206 (1971) (asserting that Supreme Court usually refuses to go behind political determinations of Congress in cases under Equal Protection Clause partly "because it allocates the finding and characterization of constitutional facts to the legislative process").

[298] Martin v. Voinovich, 840 F. Supp. 1175, 1209 (S.D. Ohio 1993) (rejecting argument that ADA overruled *Cleburne Living Center*).

[299] *See, e.g., Bartlett*, 970 F. Supp. at 1134-35. The Court in *Bartlett* rejected the argument and stated: "Congress appears to be utilizing its recognizably superior fact-finding function, providing to the Court data from which it hopes the [Supreme] Court will arrive at a conclusion that disabled persons should be given heightened scrutiny under the Equal Protection Clause." *Id.* at 1134. The Court also stated that "at the very least, [*City of*] *Boerne* [*v. Flores*] tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause." *Id. But see* James B. Miller, *The Disabled, the ADA, and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 394 (1994) (arguing that "Congress has repudiated *Cleburne*'s factual reasoning, and thus, its holding, and has declared that the disabled are a suspect class").

IV. THE CONSTITUTIONAL POWER OF CONGRESS THE COURT CANNOT IGNORE

One fundamental feature of the Fourteenth Amendment that cannot be easily altered by the vagaries of shifting judicial interpretations is the textually explicit constitutional commitment of the unique blend of powers to the federal legislature. Section 5 of the Amendment bestows on Congress both the power to *legislate* and the power to *enforce*. As the Supreme Court has stated, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint agents charged with the duty of such enforcement."[301] Of course, law enforcement is the core of executive power. Despite its obvious incongruity with the Constitution's structural principle of separation of powers, the conflation of the lawmaking and law enforcement powers in section 5 was considered necessary by its drafters to achieve the cardinal goals of the Amendment.

The powers of Congress under section 5 are exactly identical, in language and purpose, to its powers under section 2 of the Thirteenth Amendment. As explained to the Reconstruction Congress, in section 2 of the Thirteenth Amendment, "[t]he word 'appropriate' appeals to legislative discretion, and the word 'enforce' implies such compulsory measures as Congress may deem 'appropriate' for the purpose of ridding the country of every vestige of slavery, in form and in fact."[302] The powers of Congress were couched in this extraordinary format because their objective was to grant "to the people of the United States the power, by legislative enactment, to punish officials of States for violation[s] of the . . . Constitution"[303] and "to arm the Congress of the United States . . . with the power to enforce the bill of rights."[304] The drafters' decision to make Congress the primary repository of the enforcement power was in part driven by the desire to steer away the enforcement responsibility from the federal courts that failed "to redress the great wrong which has been practiced . . . under the authority of State laws, denying to citizens therein equal protection or any protection in the rights of life, liberty, and property."[305]

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[300] Aaron H. Galileo, *Fourteenth Amendment-Congressional Enforcement Power*, 8 SETON HALL CONST. L.J. 619, 623 (1998). The commentator further stated that the *Flores* court was unambiguous in its assertion that the Supreme Court, not Congress, has the power to interpret the Constitution. *Id.*

[301] Springer v. Philippine Islands, 277 U.S. 189, 202 (1928).

[302] CONG. GLOBE, 39th Cong., 1st Sess. app. at 56 (1866) (statement of Rep. G.W. Julian of Indiana).

A. The Independent Import of the Powers to "Enforce"

Even though the Supreme Court has recognized the uniqueness of Congress' section 5 power,[306] its decisions uniformly tilt toward the legislative strand of that power. The Court has yet to accord proper weight to the enforcement strand of Congress' section 5 power. That even the decisions most favorable to legislative enforcement tend to analogize Congress' section 5 power to its general power under the Necessary and Proper Clause is the unmistakable indication of such a tilt.[307] The inappropriateness of the analogy is quite obvious. First, as previously discussed, the framers purposely discarded the initial draft of the Amendment which contained the "necessary and proper" language[308] and adopted the final draft which provided Congress with the "'power to enforce,' by appropriate legislation."[309] The framers could have used the familiar language of the Necessary and Proper Clause—"carry into execution"[310]—if what they wanted to accomplish was to empower Congress to enact normal implementing legislation. Second, the Necessary and Proper Clause is only complementary to the powers enumerated in section 8 of Article I, none of which contained, at the time of the adoption of the clause, an enforcement component.[311] The substantive difference between the powers specified in section 8 of Article I and the congressional power under section 5 of the Amendment on the other, was dramatically highlighted by the Court in *Seminole Tribe v. Florida*.[312] In this case, the Court rejected a claim that the Indian Commerce Clause[313] granted Congress the power to abrogate the immunity from suit enjoyed by the States under the Eleventh Amendment[314] The Court held that

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[303] *Id.* at 1090 (statment of Rep. Bingham).

[304] *Id.* at 1088.

[305] *Id.* at 1089. Representative Bingham cited several Supreme Court cases demonstrating that the "power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied." *Id.* Then, in responding to the critics who argued that the enforcement power of Congress was unnecessary, he asked: "What have gentlemen to say to that? Sir, I stand relieved today from entering into any extended argument in answer to *these decisions of your courts*, that although as ruled the existing amendments are not applicable to and do not bind the States, they are nevertheless to be enforced and observed in States. . . ." *Id.* at 1090 (emphasis added).

[306] *See* Fullilove v. Klutznick, 448 U.S. 448, 516 (Powell, J., concurring) ("Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments.").

[307] *See Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (stating that deferential standard Court articulated in *McCulloch v. Maryland* with respect to Necessary and Proper Clause is equally applicable to congressional legislation enacted

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under section 5 of Fourteenth Amendment).

[308] CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866). The initial draft read in part: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property." *Id.*

[309] U.S. CONST. amend. XIV, § 5.

[310] U.S. CONST. art I., § 8, cl. 18.

[311] The enforcement power was first given to Congress by the Civil War Amendments (Amendments 13, 14 and 15). Later, the same power was vested in Congress by the Twenty-sixth amendment, which grants citizens of eighteen years or older the right to vote. U.S. CONST. amend. XXVI. The Eighteenth Amendment also granted enforcement power to Congress, but it was repealed by the Twenty-first Amendment. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

[312] 517 U.S. 44 (1996).

[313] U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several States, and *with the Indian Tribes*." *Id.* (emphasis added).

[314] *Seminole Tribe*, 517 U.S. at 72-73. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.

an earlier decision, which permitted Congress to abrogate the same immunity by virtue of its power under section 5 of the Amendment,[315] was inapplicable to the Commerce Clause, since "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment."[316]

By juxtaposing Congress' powers under section 5 and under the Necessary and Proper Clause, the Court missed more than their dissimilarities. It also enabled the Court to avoid any serious consideration of the scope of discretion granted by the Constitution to Congress in its capacity as law enforcer. The quintessence of law enforcement, regardless of whether it be by a prosecutor, administrative agency or Congress, is discretionary decision-making by the enforcer. Determinations as to when and how enforcement action is to be taken, the appropriate means to achieve the enforcement goals, and the effective sanctions to be imposed are the hallmarks of enforcement discretion. In the archetypical case of criminal law enforcement, "the exercise of prosecutorial discretion is not subject to judicial review,"[317] except in unusual circumstances such as racial discrimination in prosecutorial decision-making.[318] In the same vein, enforcement decisions of an administrative agency would "not be overturned in the absence of a patent abuse of discretion."[319] Agency decisions *not* to take enforce-

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CONST. amend. XI.

[315] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[316] *Seminole Tribe*, 517 U.S. at 65-66.

[317] WALTER GELLHORN ET AL., ADMINISTRATIVE LAW: CASES AND COMMENTS 316 (8th ed. 1989).

[318] *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (refusing licenses to all Chinese applicants and granting licenses to nearly all non-Chinese applicants to operate laundries in wooden buildings constituted racial discrimination in enforcement of relevant statute, violative of Fourteenth Amendment).

[319] Federal Trade Comm'n v. Universal-Rundle Corp., 387 U.S. 244, 249 (1967) (quoting Moog Industries v. F.T.C., 355 U.S. 411, 414 (1958)). The Court held that the FTC's denial of a petition to stay a cease-and-desist order was not reviewable unless the action was shown to be "patently arbitrary and capricious." *Universal-Rundle Corp.*, 387 U.S. at 250.

ment action are presumptively unreviewable.[320] In the much quoted words of Justice Scalia, "in designing the most appropriate means to enforce the law, agency discretion is at its zenith and judicial power at its nadir."[321]

As stated earlier, the Supreme Court has occasionally recognized the universal imperatives of enforcement discretion in the context of the Fourteenth Amendment. In *Ex parte Virginia*,[322] the Court correctly expounded the scope of Congress' enforcement discretion when it ruled that under the Fourteenth Amendment the judicial power did not "extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed" and that the enforcement authority belonged exclusively to Congress.[323] Likewise, in *Katzenbach v. Morgan*,[324] the Court stated that section 5 authorized Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[325]

In stark contrast with these insightful holdings, the Court in *City of Boerne v. Flores*[326] practically drained the element of discretion from the congressional power by stating that Congress "has been given the power 'to enforce', not the power to determine what constitutes a constitutional violation."[327] Justice Kennedy, who made the statement for the majority, did not explain how Congress could enact any enforcement legislation without first making its own independent judgment as to whether any given facts or conditions would constitute an actual or potential constitutional violation. Enforcement discretion is inherently integral to any enforcement power. The breadth of such discretion was best summed up, albeit in the context of administrative enforcement, by Chief Justice Burger in *Bowsher v. Synar*,[328] when he stated that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[329] In that case, the Chief Justice examined the scope of enforcement power granted to the Comptroller General under a budget-balancing statute and found that the power involved discretion to "exercise judgment concerning facts that affect the application of the Act" and to "interpret the provisions of the Act to determine precisely what budgetary calculations are required."[330] The Chief Justice concluded that "[d]ecisions of that kind are typically made by officers charged with executing a statute."[331] The essence of the enforcement discretion of Congress is not materially different from that of an administrative agency. Justice O'Connor seemed to have grasped this reality when she stated in *City of Richmond v. J.A. Croson Co.*[332] that the "power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[333]

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[320] Heckler v. Chaney, 470 U.S. 821, 832 (1985).

[321] American Trucking Ass'n v. Interstate Commerce Comm'n, 697 F.2d 1146, 1153 (D.C. Cir. 1983). *See also* American Power & Light Co. v. Securities Exch. Comm'n, 329 U.S. 90, 112 (1946) (stating "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence'" (quoting Phelps Dodge Corp. v. National Labor Relations Bd., 313 U.S. 177, 194 (1941))).

[322] 100 U.S. 339 (1879).

[323] *Ex parte Virginia*, 100 U.S. at 345-46. The Court stated:

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged.

Id. at 345. (emphasis in original).

[324] 384 U.S. 641 (1966).

[325] *Morgan*, 384 U.S. at 651.

[326] 521 U.S. 507 (1997).

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[327] *Flores*, 521 U.S. at 519.

[328] 478 U.S. 714 (1986).

[329] *Bowsher*, 478 U.S. at 733.

[330] *Id.*

[331] *Id.* In *Bowsher*, the Court invalidated the Balanced Budge and Emergency Deficit Act of 1985, which set up a mechanism for reducing the budget to zero, on the ground that part of the enforcement of the Act was entrusted to the Comptroller General, an officer of the Congress. *Id.* at 736. The Court held that "[t]he structure of the Constitution does not permit Congress to execute the laws." *Id.* at 726. Of course, the statute was not enacted by the Congress pursuant to its Fourteenth Amendment enforcement powers.

[332] 488 U.S. 469 (1989).

It is not easy to decipher the logic and reasoning of Justice Kennedy's majority opinion in *Flores*. On the one hand, it states that the power of Congress to enforce is "not the power to determine what constitutes a constitutional violation."[334] Then the concluding paragraph of the opinion states that "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference"[335]—a qualified quote from *Katzenbach v. Morgan*. The opinion found the federal statute challenged in the case unconstitutional partly on the ground that the statute's requirement that state laws that substantially burden the free exercise of religion be justified by demonstrating a compelling interest, constituted "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[336] However, the Court quoted from *Fitzpatrick v. Bitzer* the patently inconsistent statement that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[337] The entire opinion is laced with statements from prior cases that granted Congress wide latitude in making enforcement decisions, even though they were not necessary or helpful to substantiate the Court's finding of unconstitutionality of the federal statute in the case.[338] They are indicative of the weakness of the strained construction of a textually demonstrable constitutional power of Congress against the overwhelming weight of established judicial precedents.

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[333] *Croson*, 488 U.S. at 490 (emphasis in original) (citing Katzenbach v. Morgan and South Carolina v. Katzenbach, in which Supreme Court recognized enforcement discretion of Congress in determining "whether and what legislation is needed to secure the guarantees" of the Fourteenth and Fifteenth Amendments, respectively). Justice O'Connor wrote a dissenting opinion in *Flores* in which she claimed that the decision did not "in any way diminish Congress' obligation to draw its own conclusions regarding the Constitution's meaning." *Flores*, 521 U.S. at 545 (O'Connor, J., dissenting).

[334] *Id.* at 519.

[335] *Id.* at 536.

[336] *Id.* at 534.

[337] *Id.* at 518 (quoting *Fitzpatrick*, 427 U.S. at 455).

Fidelity to the text, history, and objective of the Amendment should compel the Court to assign independent significance to the word "enforce" in section 5 and concede to Congress the type of discretion that the word naturally dictates. That single word distinguishes Congress' powers under the Amendment from its other legislative powers under Article I. The recent pronouncements of the Court not only deny Congress the benefits of the enforcement power, but also seem to expunge the word "enforce" from the section by a subtle process of attrition. In *Mississippi University for Women v. Hogan*,[339] the Court "has recently gone out of its way to state that, in 'enforcing' the fourteenth amendment, Congress has no more power than do state legislatures to 'validate a law that denies the rights guaranteed by the fourteenth amendment.'"[340] The Court's ill-considered statement was in response to an argument that Congress has the constitutional authority to exempt single-sex educational institutions from the definition of sex discrimination under Title IX of the Education Amendment of 1972, a legislation enacted in furtherance of Congress' enforcement power.[341] Was it too much for the Court to conceive of the possibility of Congress making an enforcement decision that an exemption to a single-sex institution under certain conditions would not entail the denial of Fourteenth Amendment rights of the opposite sex?

The Court's determination in *Adarand Constructors, Inc. v. Pena*[342] to review race-conscious affirmative action programs "imposed by whatever federal, state or local governmental actor"[343] under strict scrutiny amounts to a calculated repudiation of Congress' enforcement power. Strict scrutiny requires Congress to demonstrate, to the satisfaction of a federal district judge, the need for enforcement, the intensity of the interests to be served, and even the true motivation[344] for the enforcement action-factors that typically form the core of enforcement discretion.[345] Strict scrutiny is fundamentally different from, and less deferential than, the patent abuse of discretion standard normally applied to review enforcement discretion. More seriously, the very idea of equating Congress with state and local government entities that have no enforcement role under the Fourteenth Amendment makes Congress' enforcement power and discretion totally irrelevant.

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[338] *Id.* at 517-19.

[339] 458 U.S. 718 (1982).

[340] William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 389 (1983) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982)).

[341] *Hogan*, 458 U.S. at 722-23.

[342] 515 U.S. 200 (1995).

B. An Appropriate Model for Judicial Deference to Congressional Interpretations

The only glimmer of hope left by the Justices in their Section 5 jurisprudence is the possibility of the Court according some unarticulated deference to Congress' legislative determinations. It needs no judicial acknowledgment that "[i]n legislating, representative assemblies interpret their respective constitutional documents."[346] This truism is recognized in the seemingly ostentatious statement of the *Flores* Court that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[347]

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[343] *Adarand*, 515 U.S. at 227.

[344] *Id.* at 226 (quoting *Croson*, 488 U.S. at 493). The *Croson* Court stated, "[strict scrutiny] also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the [racial] classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493.

[345] *See* K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397 (analyzing strict scrutiny and its implications on congressional power).

[346] WILLIAM KEEFE & MORRIS OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 412 (5th ed. 1981).

[347] *Flores*, 521 U.S. at 535. The statement was ostentatious because it, apart from stating the obvious, was meant to suggest that Congress was acting outside its power and responsibility when it enacted the statute involved in the case. Congress was undoubtedly acting within its section 5 power and the statute was

The Court also acknowledged that congressional enactments traditionally enjoy "the presumption of validity."[348] Most significantly, the Court expressed its willingness to let Congress, at least "in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment'"[349] and to give its "conclusions . . . *much* deference."[350] Clearly, the constitutional fate of future Section 5 legislation would depend on the nature and extent of deference it receives from the federal judiciary. Therefore, it is incumbent on the Supreme Court to spell out with some specificity the parameters of the deference for the guidance of Congress and the lower courts.

The Supreme Court's well-articulated principles of deference to agency interpretations of federal statutes could be the appropriate model for the judicial treatment of congressional interpretations of the Fourteenth Amendment. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[351] the prevailing formula for deference to agency interpretations was established by the Court.[352] The issue in the case was the legality of the Environmental Protection Agency's (EPA) interpre-

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claimed to be necessary to protect the religious freedoms of minority religious groups—a legislative action within Congress' constitutional responsibility.

[348] *Id.* (quoting James Madison's statement to Congress in 1789, which he made as member of House of Representatives).

[349] *Id.* at 536 (quoting *Morgan*, 384 U.S. at 651).

[350] *Id.* (emphasis added).

[351] 467 U.S. 837 (1984).

[352] *Chevron*, 467 U.S. at 842-45. The *Chevron* doctrine of judicial deference is not by any means free from controversy. Some commentators strongly defend the *Chevron* holding. *See, e.g.,* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) (stating that broad delegation to executive is hallmark of modern government and agency rulemaking is rule, not exception); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 566-67 (1997) (book review) (arguing for maximum administrative flexibility to adapt statutory text to values and circumstances). However, other commentators have criticized *Chevron*'s approach. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986) (arguing breadth and complexity of regulatory and administrative issues negates utility of simple formula); Thomas W. Merill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 363-73 (1994) (arguing application of *Chevron* doctrine by Supreme Court has been inconsistent).

tation of the Clean Air Act.[353] The EPA, pursuant to its mandate to require permits by "new or modified major stationary sources" of air pollution, adopted a plant-wide definition of the term "stationary source" which in effect allowed modifications of one or more pollution-emitting devices within the plant without meeting permit conditions, so long as the total emissions from the entire plant did not worsen the air quality that existed before the modification.[354] According to the EPA, the expanded definition was necessary to achieve the goal of improved air quality without stifling the economic growth of the regulated industries.[355] On review, the court of appeals, agreeing with the argument that the EPA interpretation would only help maintain the existing air quality, rather than enhancing it as contemplated by the statute, ruled that the interpretation was erroneous.[356] The Supreme Court reversed the court of appeals and held that the interpretation of the EPA was reasonable and, therefore, entitled to binding deference of the judiciary.[357]

Under the framework established by the Supreme Court in *Chevron*, the nature and extent of judicial deference owed to an agency are dependent on the clarity and scope of the statutory authority granted by Congress to the agency. If Congress has explicitly authorized the agency to fill the gaps left in the statute or to elucidate any of its specific provisions, agency regulations issued by virtue of such express delegation are to be given "controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."[358] In a case where Congress has directly spoken to the precise question at issue, both the agency and the reviewing court must give effect to such unambiguously expressed intent of Congress.[359] However, "if the statute is silent or ambiguous with respect to the specific issue," the reviewing court must accept a reasonable construction of the statute made by the agency responsible for administering it, even if the court thinks that the construction is incorrect or inappropriate.[360]

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[353] *Chevron*, 467 U.S. at 840. The agency adopted the "bubble concept" which lumped together all pollution-emitting devices within the entire plant as if they are encased in a single imaginary bubble. *Id.*

[354] *Id.* The plant owner would be permitted to make technological changes to the existing devices even if such changes would increase the emission of pollutants provided that such increases are offset by the remainder of the pollution-emitting devices so that the total volume of the emissions of the entire plant would not exceed the pre-existing level. *Id.* In other words, the total emissions after the technological modification within the plant could not burst the bubble that encased the pre-existing volume of pollutants. *Id.*

[355] *Id.* at 858.

[356] *Id.* at 859.

[357] *Id.* at 859-66.

Thus, *Chevron* has established an absolute presumption that silence or ambiguity in an agency-administered statute is tantamount to an implied delegation of interpretative lawmaking discretion to the agency. The Court gave several persuasive practical and legal justifications for the presumption. First, it recognized that not all statutory gaps and imprecisions are the result of congressional laziness and inadvertence. Congress may at times be tempted to defer novel and difficult issues, especially issues that involve clash of competing interests and policies, for resolution in the agency process which in many ways is akin to the legislative process.[361] Then, the Court underscored the fact that "the resolution of ambiguity in a statutory text is often more a question of policy than of law,"[362] and the constitutional desirability of making policy choices by the political branches rather than federal judges who are "not part of either political branch of the Government" or "have no constituency."[363] Moreover, the resolution of many of the contentious and complex issues "require significant expertise and entail the exercise of judgment grounded in policy concerns."[364] Therefore, under the dictates of *Chevron*, the courts should presume that Congress has designated the agency charged with administering the statute "as the repository of delegated lawmaking discretion" unless the judiciary is explicitly given that discretion.[365]

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[358] *Id.* at 844 (citing United States v. Morton, 467 U.S. 822, 834 (1984)); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424-26 (1977); AT&T v. United States, 299 U.S. 232, 235-37 (1936). The Court also stated that when legislative delegation to an agency on a particular question is implicit rather than explicit, a court may not substitute its own construction of a statutory provision for a reasonable interpretation of the administering agency. *Chevron*, 467 U.S. at 844 (citing INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981), and Train v. NRDC, 421 U.S. 60, 87 (1975)).

[359] *Id.* at 842-43. The Court stated that the judiciary, as the final authority on statutory construction, must reject the administrative constructions of a statute which are contrary to clear congressional intent. *Id.* at 843 n.9.

[360] *Id.* at 843. The Court added that the reviewing Court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question had initially arisen in a judicial proceeding." *Id.* at 843 n.11.

[361] *Id.* at 865. The Court stated, "[P]erhaps [Congress] simply did not consider the question . . . and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred." *Id.*

The very same compelling rationale that prompted it to fashion the *Chevron* doctrine must compel the Supreme Court to accord at least an equal measure of deference to most of the interpretative legislations enacted by Congress under the Fourteenth Amendment. The perfect combination of legislative and enforcement powers of Congress is identical to the statutory power the interpreting agencies are required to possess as a precondition for invoking the *Chevron* deference. For instance, in *Martin v. Occupational Health Review Commission*,[366] a unanimous Court held that interpretations of the Secretary of Labor rendered as "a 'necessary adjunct' of the Secretary's powers to promulgate and enforce national health and safety standards"[367] supported "the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court."[368] In contrast, the Court declined to defer to the Secretary's interpretation of another statute in *Adams Fruit Co. v. Barrett*,[369] since the statute only gave the Secretary the authority to promulgate standards implementing its provisions, leaving the enforcement authority entirely to the judiciary.[370] Thus, the conflation of legislative and enforcement powers is a necessary prerequisite for the application of the *Chevron* doctrine and the Fourteenth Amendment satisfies that requirement. The Amendment in fact provides the ideal setting for the adoption of the *Chevron* doctrine for the purpose of review of congressional enforcement legislation.

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[362] Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991). The Court stated, "[a]s *Chevron* itself illustrates, the resolution of ambiguity in a statutory text is often more a question of policy than of law." *Pauley*, 501 U.S. at 696 (citing Cass R. Sunstein, *Administration After* Chevron, 90 COLUM. L. REV. 2071, 2085-88 (1990)).

[363] *Chevron*, 467 U.S. at 866. The Court also alluded to the political accountability of agencies: "While agencies are not directly accountable to the people, the Chief Executive is. . . ." *Id.*

[364] *Pauley*, 501 U.S. at 697. The Supreme Court has consistently observed Congress' deference to agency expertise in complex matters. For example, in *Chevron*, the Court stated:

> Congress intended to accommodate both interests, but did not do so itself on the level of specificity. . . . Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.

Chevron, 467 U.S. at 865. *See also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (holding broad deference to agencies is warranted in complex, technical matters).

[365] John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626 (1996).

The most enlightening feature that makes the *Chevron* doctrine adaptable to congressional interpretations is its constitutional underpinnings. The Court emphasized repeatedly that the deference of the *Chevron* doctrine reflects judicial "sensitivity to the proper roles of the political and judicial branches" in interpreting ambiguous provisions in agency-administered statutes.[371] *Chevron*'s proposition that policy formulation through interpretive lawmaking should be done in a representative and participatory process by governmental entities directly or indirectly accountable to the people is constitutionally inspired. The proposition is firmly grounded on the principle of the separation of powers—"one of the Constitution's structural protections of liberty."[372]

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[366] 499 U.S. 144 (1991).

[367] *Martin*, 499 U.S. at 152.

[368] *Id.* at 153.

[369] 494 U.S. 638 (1990).

[370] *Adams Fruit Co.*, 494 U.S. at 650.

[371] *Pauley*, 501 U.S. at 696.

[372] Printz v. United States, 521 U.S. 898, 921 (1997). In its discussion of dual sovereignty, the Court noted that the "separation of the two spheres is one of the

The Constitution does not leave to speculation which branch of the government is to legislate on and enforce the rights secured by the Fourteenth Amendment. The delegation of the twin powers of legislation and enforcement to the Congress is as explicit and unambiguous as the language could ever express it. Thus, in *Chevron* terms, the Constitution has clearly spoken on the issue of delegation, and therefore, congressional interpretative legislation under the Amendment should be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the Constitution. By adopting this rule as the proper standard for review of Congress' interpretive legislations under the Amendment, the Court would be able to abide by an explicit textual constitutional command, and at the same time to retain its power, "as [it has] since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."[373] But the failure to give controlling weight to such legislation would amount to judicial usurpation of congressional power in violation of the principles of the separation of powers.[374]

It is unlikely that the Court which currently insists that

Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921.

The Court has been vigilant in enforcing and protecting the separation of powers doctrine through a long line of significant cases. *See, e.g.*, Clinton v. City of New York, 118 S. Ct. 2091, 2108 (1998) (holding presidential line item veto unconstitutionally violated separation of powers); Morrison v. Olson, 487 U.S. 654, 693-97 (1988) (holding that Independent Counsel Statute duly respected traditional role of government branches); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (holding Balanced Budget Act which authorized comptroller general who answered to Congress to execute laws violated separation of powers). *See also* INS v. Chadha 462 U.S. 919, 944-46 (1983) (holding congressional veto of Attorney General's decision to suspend respondent's deportation violated separation of powers).

[373] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[374] The separation of powers doctrine prohibits both encroachment (usurpation) by one branch of government of the powers of another branch and aggrandizement (enrichment and amassment) of one branch's power at the expense of another branch. By not giving proper weight to congressional legislation, the Court would be violating the separation of powers principle not only by encroaching upon the powers of Congress, but also by the Court aggrandizing itself at the expense of Congress. *See Morrison*, 487 U.S. at 693-97; *Bowsher*, 478 U.S. at 726-27.

Congress has no "power to decree the substance"[375] of the rights secured by, or of the restrictions imposed on the states, by the Fourteenth Amendment, would agree to live with the "arbitrary and capricious" standard as dictated by *Chevron*. Also, since the Constitution is silent about the meaning of the allegedly ambiguous provisions of the Amendment, such as the Equal Protection Clause, it could be plausibly argued that the relevant deference principle applicable to interpretive legislations of Congress is the one warranted by the second prong of the *Chevron* doctrine. Under such a scenario, Congress, as the undisputed enforcer of the Amendment, is entitled to the categorical presumption that the Constitution has chosen it as the repository of interpretive authority. There are good reasons to believe that the Court could eventually be persuaded to espouse such a presumption as the foundation for its rules of deference to congressional interpretations. One source of optimism is the Court's often repeated statement that Congress has the power, at least in the first instance, to determine whether and what legislation is needed to secure the guarantees of the Amendment. That means, if it is taken at its own words, the Court has already established a *Chevron*-type presumption in favor of Congress. But the most powerful reason for judicial deference to enforcement legislation of Congress stems directly from the Constitution.

The most explicit and unambiguous command of the Constitution found on the face of the Amendment is that the enforcement of its provisions has to be accomplished by legislation. The most elementary meaning of the command is not only that Congress should exercise its own enforcement discretion, but also that any concomitant interpretation of the meaning of the Amendment should undergo the legislative process. The Constitution meticulously prescribes the procedure for enacting legislation.[376] Congress is permitted neither to circumvent the prescribed procedure[377] nor to let other branches of the government to participate in the legislative process.[378] Even the delegation of Congress' lawmaking function to administrative agencies is strictly controlled by the structural principles set by the Supreme Court.[379] There is no constitutional provision that would permit the judiciary to participate in the legislative process of Congress. Therefore, any role or involvement of the Supreme Court in shaping the interpretive legislation under the Fourteenth Amendment would be an unconstitutional participation of the judiciary in the legislative process which is reserved exclusively to Congress.[380]

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[375] *Flores*, 521 U.S. at 519.

[376] U.S. CONST. art. I, § 7. *See Chadha*, 462 U.S. at 951 ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal government be exer-

The history, design, and language of the Fourteenth Amendment afford no basis for interpretive lawmaking by the judiciary.[381] On the contrary, the framers of the Amendment

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cised in accord with a single, finely wrought and exhaustively considered, procedure.").

[377] *See Chadha*, 462 U.S. at 957-59 (striking down statute which provided for legislative veto of agency regulations without following "bicamaralism" and "presentment" requirements set by Article I of Constitution for enacting valid legislation).

[378] *See Clinton*, 118 S. Ct. at 2108 (striking down Line Item Veto Act, which authorized President to cancel certain items of bill after bill was signed into law). The Court stated that the Act unconstitutionally permitted the President to amend a congressional act. *Id.* The Court stated, "There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id.* at 2103.

[379] *Cf.* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-42 (1935) (holding delegation of legislative power to President under section 3 of National Industrial Recovery Act was unconstitutional); Panama Ref. Co. v. Ryans, 293 U.S. 388, 432-33 (1935) (holding when Congress delegated legislative authority to President, President must follow congressionally defined procedures and rules). The Court invalidated the National Industrial Recovery Act of 1933 on the ground that Congress unconstitutionally delegated its legislative powers to the President. *Schechter*, 295 U.S. at 542. *See also* Mistretta v. United States, 488 U.S. 361, 371-84 (1989) (discussing nondelegation doctrine).

[380] The constitutional convention of 1787 soundly rejected the suggestion that the judiciary be allowed to share the legislative powers of the nation along with the executive and legislative departments. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 75 (Max Farrand ed. 1937). The proposal was denounced by one participant as follows: "It was making Statesmen of the Judges; and setting them up as guardians of the Rights of the people . . . . It was making the Expositors of the Laws, the Legislators which ought never to be done." *Id.* He preferred "the Representatives of the people as the guardians of their Rights [and] interests." *Id.*

[381] *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF

expressly committed the task to Congress. As the Court recently stated in an analogous context, "[t]here are powerful reasons for construing constitutional silence" concerning judicial participation in the enforcement of the Amendment as equivalent to an express prohibition.[382] The quality of the interpretation made through the deliberative process of the legislature are bound to be superior to those made unilaterally by the judiciary in episodic litigation. Making of public policies by the political branches, rather than by the judiciary, is consistent with the basic constitutional commitments to representative democracy and electoral accountability. The very same considerations that favored the lodging of the enforcement powers in Congress also prompted the Court to devise the *Chevron* doctrine.[383] Therefore, the *Chevron* principle of judicial deference

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THE FOURTEENTH AMENDMENT 229 (1977) ("So far as I could find that history affords no basis for reading into § 5 the judicial power of enforcement it so plainly withheld. Minimally the legislative history indicates that where Congress has spoken, that policy ought to be respected."). Berger also stated that Alexander Bickel invoked statements of the drafters and supporters of the Amendment "to the effect that the Amendment's 'imperfections' may be cured by 'further legislation, enabling acts, by legislative wisdom. . . .'" *Id.* at 105 (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 63 (1962)).

[382] *Clinton*, 118 S. Ct. at 2103. In that case, the Court was exploring whether the President could constitutionally cancel a part of a validly enacted Act of Congress without following the legislative procedures set out in article one. *Id.* at 2102-04. The Court found that "[t]here is no constitutional provision that authorizes the President to enact, to amend, or to repeal statutes." *Id.* at 2103. Although the Constitution gives the President a "role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes." *Id.* The Court stated: "There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition." *Id.* The main reason identified by the Court was that the constitutional procedures governing enactment of statutes "were the product of the great debates and compromises that produced the Constitution itself. . . ." *Id.*

[383] *Chevron* 467 U.S. at 865-66. Also, in *Martin*, the Court, finding that the Secretary's interpretive lawmaking power was a "necessary adjunct" to her enforcement power, noted the "structural advantages" enjoyed by the Secretary over a counterpart agency which had only adjudicatory powers under the same statute. *Martin*, 499 U.S. at 152. The Court stated: "Moreover, by virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission [which possessed only adjudicatory authority], which encounters only those regulatory episodes resulting

fits perfectly in the context of interpretive legislation enacted as an adjunct to Congress' enforcement power.

C. The Prevailing Principles of Deference to Congressional Findings

Judicial deference to congressional legislation is not a newly minted idea. There is a long line of cases in which the Supreme Court accorded "customary deference" to congressional judgments on the question of constitutionality of its own legislative actions.[384] In *Rostker v. Goldberg*,[385] Justice Rehnquist, writing for the Court, explained why Congress as a co-equal branch deserved such deference by the judiciary.[386] Invoking an earlier opinion of Justice Frankfurter, he emphasized "the fact that this [Supreme] Court [when reviewing congressional legislation] is not exercising a primary judgment but sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."[387] In *Rostker*, the Court rejected an equal protection challenge to a federal statute that required males but not females to register for the draft without subjecting the legislation to any particular standard of review.[388] In deciding the question of constitutionality, the Court was "particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [the Court's] own evaluation of evidence for a reasonable evaluation by the Legislative

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in contested citations." *Id.* The Court also noted the policy making expertise of the Secretary. *Id. See also* Manning, *supra* note 365.

[384] *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

[385] 453 U.S. 57 (1981).

[386] *Rostker*, 453 U.S. at 64. "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Id.*

[387] *Id.* (quoting *McGrath*, 341 U.S. at 164 (Frankfurter, J., concurring)).

[388] *Id.* at 83. The Court simply stated: "Announced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result." *Id.* at 69-70.

Branch."[389]

Most recently, the Court seemed to build a stable jurisprudential foundation for the principle of judicial deference to congressional legislations implicating important constitutional values. In 1994, the Court in *Turner Broadcasting System v. Federal Communications Commission (Turner Broadcasting I)*[390] held that its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo* or to replace Congress' factual predicates with [the Court's] own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[391] Moreover, the record relevant to the evaluation of the substantiality of the evidence need not be as elaborate as is normally required in an adjudicatory setting. The Court specifically stated that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."[392] The Court also ruled that "courts must accord substantial deference to the predictive judgments of Congress."[393]

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[389] *Id.* at 68. The Court in *Rostker* emphasized that the congressional legislation pertained to national defense and military affairs and that "perhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64-65.

[390] 512 U.S. 622 (1994).

[391] *Turner Broad. I*, 512 U.S. at 666. The reviewing court should inquire whether the legislation is within the power of Congress, whether it furthers an important governmental interest, and whether the governmental interest is unrelated to the suppression of free expression. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). *See also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (stating courts should make independent review of records in speech cases); Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 241-44 (1985) (providing detailed analysis of independent judgment rule and its rationale).

[392] *Turner Broad. I*, 512 U.S. at 666. The Court also recognized that "[a]s an institution, Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data'" bearing upon complex and dynamic issues. *Id.* at 665 (quoting Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).

[393] *Id.* Congress in the case made the important finding that without the aid of the challenged rule, the continued viability of local broadcast television would be "seriously jeopardized." *Id.* But that was just a predictive judgment not readily

Turner Broadcasting I involved a challenge to the "must-carry provisions" of a federal statute that required cable television systems to devote a portion of their channels to the transmission of local broadcast stations.[394] The cable systems alleged that the provisions abridged their freedom of speech or of the press in violation of the First Amendment.[395] The Court remanded the case for insufficiency of record to determine the issues presented, and by doing so the operational effect of the deference rules just announced by the court in First Amendment cases remained uncertain.[396] When the case came up for review the second time, the Court in *Turner Broadcasting Systems v. Federal Communications Commission (Turner Broadcasting II)*[397] seized the opportunity to revisit the principles of deference, to demonstrate its applicability to congressional findings in First Amendment free expression cases, and, most relevant to this article, to make sharp comparison between the deference principles applicable to congressional findings and administrative findings.

First, the Court reiterated its statement in *Turner Broadcasting I* that the Court's "sole obligation is to 'assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'"[398] However, the Court clarified that the "substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency."[399] The Court then identified two considerations that underpin the principles of deference—Congress' superior fact-finding capabilities and its constitutional role as the lawmaker.[400] The Court felt that it "owe[s] Congress' findings deference in part because the insti-

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supported by the record. *Id.* at 667.

[394] *Id.* at 630-34.

[395] *Id.* at 634-36.

[396] *Id.* at 668.

[397] 520 U.S. 180 (1994).

[398] *Turner Broad. II*, 520 U.S. at 195 (quoting from *Turner Broad. I*, 512 U.S. at 666).

[399] *Id.* (citing *Turner Broad. I*, 512 U.S. at 670 n.1 (Stevens, J. concurring)).

[400] *Id.* at 195-96.

tution 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon' legislative questions."[401] This deference is "in one respect akin to deference owed to administrative agencies because of their expertise."[402] The Court also perceived a duty to give "an additional measure of deference" to Congress' findings "out of respect for its authority to exercise the legislative power."[403] The Court applied these rules of deference to the constitutional question at hand:

> Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.[404]

The result was quite favorable to Congress. The Court accepted Congress' predictive judgments concerning the economic impact of the must-carry provisions on the litigants in the case. The Court required of Congress nothing more than a showing that "its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination."[405] This requirement sounded more like the minimum rationality standard than the standard of intermediate scrutiny which the four dissenting justices thought applicable to content-neutral regulations under the First Amendment.[406]

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[401] *Id.* at 195 (citing *Turner Broad. I*, 512 U.S. at 665-66).

[402] *Id.* at 196.

[403] *Id.*

[404] *Id.*

[405] *Id.* at 224.

[406] *Id.* at 229 (O'Connor, J., dissenting). The dissenting Justices claimed that the Court misapplied intermediate scrutiny and failed in its independent duty to identify the government interest and to inquire about the reasonableness of congressional findings regarding its necessity and to examine the fit between its goals and its consequences. *Id.* at 229-30 (O'Connor, J., dissenting). They insisted

The level of judicial deference accorded congressional enforcement legislations in the past surpassed the level established in the *Rostker* and the *Turner Broadcasting* cases. *Katzenbach v. Morgan*[407] represents the high water mark of Supreme Court deference to enforcement legislation. In *Morgan,* the Court considered the constitutionality of a federal law designed to supersede a New York law that denied voting rights to Spanish-speaking citizens who were literate in Spanish, even though the Supreme Court already determined that such denial based on English literacy did not violate the Equal Protection Clause.[408] The Supreme Court upheld the federal statute stating that the Court "perceive[d] a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause."[409] The Court readily accepted the legislative findings of Congress that the literacy requirement was invidious discrimination and rejected similar findings of the state legislature that was consistent with the Court's prior decision.[410] In choosing between two conflicting findings, the Court "applied the rule of deference to Congress and required the state to yield to the federal enactment."[411] Thus, the Court allowed the congressional interpretation of the Equal Protection Clause to prevail over the interpretations of the Court and the State of New York.[412]

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that the Court applied an "inappropriately lenient level of scrutiny . . . exhibiting an extraordinary and unwarranted deference for congressional judgments, a profound fear of delving into complex economic matters, and a willingness to substitute untested assumptions for evidence." *Id.* at 258-59 (O'Connor, J., dissenting). *See also* Note, *Deference to Legislative Fact Determinations in First Amendment Cases after* Turner Broadcasting, 111 HARV. L. REV. 2312, 2329 (asserting that level of deference accorded by *Turner Broadcasting* case to congressional fact-finding can have significant adverse impact on implementation of First Amendment's Speech and Press Clauses).

[407] 384 U.S. 641 (1966).

[408] *Morgan,* 384 U.S. at 643-44, 649.

[409] *Id.* at 656.

[410] *Id.* at 654-56.

[411] Cox, *supra* note 297, at 229.

[412] *Morgan,* 384 U.S. at 656-58.

In *Fullilove v. Klutznick*,[413] the congressional race-conscious legislation received a high degree of judicial deference. Chief Justice Burger's controlling opinion stated that the Court was bound to give "appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power . . . 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."[414] The Court without question accepted the historical knowledge of Congress as to the continuing effect of past discrimination on minorities and let Congress "act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities."[415] The Court did not require Congress to produce a record—"the kind of 'record' appropriate with respect to judicial or administrative proceedings."[416] The Chief Justice specifically declined to review the enforcement legislation under any established standard of judicial scrutiny as insisted by the dissenting justices in the case.[417]

A majority of the Justices in *Metro Broadcasting v. Federal Communications Commission*[418] fully endorsed the deferential approach of the *Fullilove* case and approved the FCC's program that gave preference to minorities in broadcast licensing.[419] The Court was emphatic that judicial "deference was appropriate in light of Congress' institutional competence as the National Legislature."[420] Even in *City of Boerne v. Flores*[421] the Court stated that Congress' enforcement "conclusions are entitled to much deference,"[422] though the statement may amount to nothing more than a platitude because Congress was not given any deference in that case and it was admonished that it had no power "to decree the substance"[423] of the rights secured by the Amendment.

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[413] 448 U.S. 448 (1980).

[414] *Fullilove,* 448 U.S. at 472.

[415] *Id.* at 485.

[416] *Id.* at 478.

[417] *Id.* at 490-92.

[418] 497 U.S. 547 (1990).

[419] *Metro Broad.*, 497 U.S. at 600.

[420] *Id.* at 563. The Court overruled *Metro Broadcasting,* and raised doubts concerning the precedential value of *Fullilove* with respect to the interpretation of the Equal Protection Clause. Adarand Constructors v. Pena, 515 U.S. 200, 227, 235 (1995). Whether the deference principles announced in *Metro* and *Fullilove* have vanished with those cases is an open question.

[421] 521 U.S. 507 (1997).

Clearly, the Supreme Court has an established tradition of giving substantial deference to congressional legislations that implicate important constitutional rights and privileges. The deference principles applied to enforcement legislations in the past were broader in scope than those applied to legislations enacted solely by virtue of Congress' legislative power under Article I of the Constitution. However, the Court never clearly defined the dimensions or drew the outer parameters of the deference the judiciary owes to congressional enforcement legislation. The Court's decisions in *Rostker* and *Turner Broadcasting* represent the most detailed and unorthodox articulation of the principles of deference to constitutional interpretation of Congress. If the Court is willing to give substantial deference to Congress' Article I legislations, then it should have no difficulty in according heightened deference to enforcement legislations enacted by Congress by virtue of its unique powers under the Fourteenth Amendment. The *Chevron* principle of deference provides the ideal and appropriate framework for developing rules of heightened deference to enforcement legislations.

The same constitutionally inspired considerations of institutional competence and democratic accountability in public policy decision-making that undergird the *Chevron* doctrine should operate as compelling justification for fashioning principles of heightened deference to Congress' interpretive lawmaking under the Amendment. Giving such heightened deference to Congress is more than a matter of interbranch courtesy; it is a constitutional imperative.

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[422] *Flores,* 521 U.S. at 536.

[423] *Id.* at 519.

V. CONCLUSION

With its recent decisions in *Adarand* and *Flores*, the Supreme Court has narrowed the scope of Congress' enforcement power under the Fourteenth Amendment beyond recognition. By denying Congress the power to interpret the substantive meaning of the rights secured by the Amendment as warranted by the exigencies of enforcement decisions, and by requiring it to subject enforcement legislations to strict judicial scrutiny, the Court has grievously drained Congress of its constitutionally granted legislative and enforcement discretion. The Court's constitutional duty to say what the law is does not warrant the assumption of sweeping authority to repudiate an explicit textual command of the Constitution.[424] The Court's pronouncement that the rights secured by the Amendment, like those secured by the original Bill of Rights, are self-executing defies its own observation in previous cases that "[s]ome legislation is contemplated to make the [A]mendment fully effective."[425]

The overriding significance of the dictate of the Amendment, that Congress shall enforce by appropriate legislation to the entire issue of interpretive authority, cannot be gainsaid. It implicates the requirement that interpretations of the Amendment are to be refined in the democratic furnace of the legislative branch, fueled by both the legislative and enforcement discretions of Congress. To claim that the interpretive authority is the exclusive preserve of the judiciary is to substitute the constitutionally prescribed deliberative process of interpretation with the judicial process which is inherently circumscribed, unrepresentative and unaccountable. Nevertheless, the Court undeniably has made the determination to supplant the constitutionally prescribed process. But the Court's perilous course is not redeemable by the text, design, or history of the Amendment or by the Court's own carefully evolved precedents.

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[424] The congressional authority under section 5 of the Amendment to enforce the Amendment by legislation is absolutely explicit and unambiguous. U.S. CONST. amend. XIV, § 5. As Justice Jackson once queried: "Isn't the one thing that is perfectly clear under the Fourteenth Amendment that Congress is given the power and the duty to enforce the Fourteenth Amendment by legislation?" ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 6 (1970).

[425] *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

The Rehnquist Court's new interpretive approach would profoundly affect the interests of minorities and other vulnerable segments of our society who are the primary beneficiaries of the rights secured by the Amendment. Proper sensitivity to these interests would have prompted the Court to streamline its blanket claim of interpretive autonomy and let Congress share the interpretive function under the Amendment according to some mutually agreeable principles of institutional competence and democratic accountability.[426] For example, it would have been possible for the Court to assert primary responsibility to interpret the meaning and scope of the Due Process Clause of the Amendment on the basis of its long familiarity with the concept that is more attuned to the judicial process than to the legislative process. The Court could also plausibly claim to possess superior institutional competence and expertise to define the rights secured by the first ten amendments even though they are within the purview of the Privileges and Immunities Clause of the Fourteenth Amendment. Congress is especially in a precarious legal position to assert interpretive superiority with respect to parts of the Bill of Rights, such as the Free Exercise Clause and Free Speech Clause of the First Amendment, which prohibits Congress from abridging individual rights. However, the Court has no standing under the Fourteenth Amendment to restrain Congress from enacting enforcement legislation in order to protect the free speech or free exercise rights of minorities from state infringements.

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[426] Commentators have made compelling arguments in favor of "shared vesting of responsibility for the safeguarding of constitutional values" in both the legislative and judicial branches of our government. *See* Sager, *supra* note 275, at 1263; *see also* Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J. L. & PUB. POL. 719, 786-87 (1998).

> Uncritical endorsement of judicial supremacy in matters of constitutional interpretation not only conflates what the Constitution says with what judges and justices *say* that it says, but it allows the members of the other branches to escape their responsibility to assess the constitutionality of the measures they are asked to pass (in the case of Congress) or sign into law (in the case of President).

Id.

The Court's determination to usurp the interpretive authority and responsibility of Congress with respect to the Equal Protection Clause is totally bereft of any constitutional foundation. Nor is it supportable by any notion of institutional competence superior to that of Congress to delineate the causes for, or to formulate solution to, national problems of racial and gender discrimination in employment, education, and economic intercourse. As Chief Justice Burger stated, "Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems,"[427] and it "may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."[428] The Court would be nothing more than a dog in the manger if it attempts to meddle with congressional efforts to deal with those problems, especially problems concerning racial, gender, and disability discrimination. Both the text and history of the Amendment demonstrate that its framers had chosen Congress, rather than the Courts, as the primary interpreter of the provisions of the Amendment.[429]

Since the Court at present is unwilling to be amenable to Congress' interpretive authority, the next best thing the Court could do to abide by the imperatives of the Amendment is to accord enforcement legislation such respect and deference as the unique power of Congress under the Amendment intrinsically commands. The *Chevron* principle which gives binding deference to reasonable legislative rules issued by agencies charged with administering federal statutes could be the appropriate model for fashioning rules of deference to congressional interpretive legislation under the Amendment. The combination of legislative and enforcement powers that the agencies are required to possess for receiving the *Chevron* deference is functionally similar to the congressional powers under the Amendment.

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[427] *Fullilove*, 448 U.S. at 486.

[428] *Id.* at 478.

[429] *See* BERGER, *supra* note 381, at 221-29. "At the outset Conkling stated that all questions 'arising upon . . . construction' of the Amendment would go to the 'appropriate forum. . . . [T]he forum would be Congress, and also, perhaps the courts.'" *Id.* at 228 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866)). Berger states: "So far as I could find that history affords no basis for reading into § 5 the judicial power of enforcement it so plainly withheld." *Id.* at 229. According to Willard Hurst, "it is pretty plain that the actual framers [of the Amendment] thought they were delegating the rulemaking power to Congress." *Id.* at 228 n.332 (citing SUPREME COURT AND SUPREME LAW 60 (Edmond Cahn ed. 1954)).

The Court's refusal to accept the terms of the Fourteenth Amendment as written has been a disaster not only for the rule of law but to the constitutionally protected rights and interests of the nation's racial and ethnic minorities. Caesar should be content with what is due to Caesar. The power granted Congress by the Fourteenth Amendment should be left to Congress and derivatively to the people it represents and to whom it is accountable. Congress should not be deprived of its profoundly significant remedial and enforcement power by shifting and unprincipled interpretive techniques.[430] As Justice Powell admonished, the Court "should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a non-representative, and in large measure insulated, judicial branch."[431] The contradictions are infinitely proliferated when the oversight is exercised in open defiance of a constitutional prohibition.

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[430] The Court's indiscriminate and unprincipled restructuring of the Fourteenth Amendment is fraught with the danger of undermining the integrity of the constitutional process of adjudication. As the eminent legal philosopher Ronald Dworkin cautioned, "The Court should refuse to nourish the cynical views, already popular among its critics, that constitutional law is only a matter of which President appointed the last few justices." RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 57 (1996).

[431] United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

THE IMPORT-EXPORT CLAUSE

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I. INTRODUCTION

A companion piece to the Commerce Clause of the Constitution is the less well-known Import-Export Clause:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.[1]

The Import-Export Clause was the principal remedy proposed by the Philadelphia Convention to remedy the commercial strife that characterized the relations among the states under the Articles of Confederation, as noted by the Supreme Court in 1976:

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[1] U.S. CONST., art. I, § 10, cl. 2. *See generally* Elliot D. Hinds, Student Paper, *State Taxes and the Import-Export Clause*, 14 AM. J. TAX POL'Y 73 (1997); Andrew Lizotte, Comment, *Taxation—State Excise Taxes on Goods to Be Exported Held Unconstitutional*, 15 SUFFOLK TRANSNAT'L L.J. 430 (1991). *See also* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941); Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L. BUS. 1, 6-14 (1994); Walter Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1428-30 (1977).

> One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased. Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States. At the same time, there was no secure source of revenue for the central government.[2]

The Constitutional Convention of 1787 adopted the Import-Export Clause a few days after it adopted the Federal Export Clause, which forbids the federal government from imposing taxes or duties on "articles exported from any state."[3]

The Import-Export Clause has long been overshadowed by the Commerce Clause, but their roles were reversed at the Philadelphia Convention, where commercial strife among the states occupied center stage and evoked the passion and eloquence of the delegates, including the Convention's most memorable metaphors—New Jersey was known as the "[c]ask tapped at both ends" by New York and Philadelphia; North Carolina was the "patient bleeding from both arms" because it was located between Virginia and South Carolina.[4] The proposed remedy for this exploitation of the inland states by the seaboard states was the Import-Export Clause. There were, to be sure, complaints about the lack of effective national commercial leadership, and the Commerce Clause was adopted to cure this deficiency in the Articles of Confederation by authorizing Congress to regulate interstate and foreign commerce. However, the discussion of this issue was tame when compared with the fire and brimstone that erupted during the debate over the Import-Export Clause. Indeed, the Commerce Clause seemed to evoke even less attention than the Federal Export Clause, which prohibited federal taxes or duties on "articles exported from any state."[5]

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[2] Michelin Tire Corp. v. Wages, 423 U.S. 276, 283 (1976).

[3] U.S. CONST. art. I, § 9, cl. 5. *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 445 (1827) (stating that "[t]here is some diversity in language [between the Import-Export and Federal Export Tax Clauses], but none is perceivable in the act which is prohibited").

[4] James Madison, *Preface to Debates in the Convention of 1787*, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 539, 542 (Max Farrand ed., rev. ed. 1966).

This marked difference of tone in the Philadelphia debates extends to the choice of language in the phrasing of the Import-Export Clause and the Commerce Clause themselves: the Import-Export Clause is detailed, reflecting its emergence from a spirited debate that aired a diversity of rival proposals for ending the perceived commercial evils, while the Commerce Clause is vague and general, like the terse comments supporting its adoption. On the other hand, the two provisions embody a common failing: neither answered in advance the most troublesome and important question of interpretation. For the Commerce Clause, the question was whether it operated of its own force to restrict state regulations of interstate commerce, even if Congress had not preempted the subject; and for the Import-Export Clause, the unaddressed question was whether it applied to domestic and foreign commerce, or only to the latter. These issues were not settled by the Supreme Court until 1851 and 1868, respectively.[6]

The Import-Export Clause not only attracted more attention at Philadelphia than the Commerce Clause, but its language responded so explicitly and seemingly so comprehensively[7] to the commercial maladies that led up to the Annapolis conclave of 1786, and then to the Philadelphia Convention, that it is not entirely clear what other problems were to be solved by the Commerce Clause. To be sure, the Import-Export Clause restricts only the taxing powers of the states, not their regulatory authority; the latter area of potential interstate commercial strife was subjected to centralized congressional control by the Commerce Clause. But the commercial complaints of 1787 were overwhelmingly, if not exclusively, attributed to state taxes, not to other types of state regulation. As for use of the Commerce Clause as a lever enabling Congress to regulate *private* enterprise as well as to demolish objectionable *state* regulations, there is little evidence that this extension of federal authority was the focus of the Framers' attention.

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[5] U.S. CONST. art. I, § 9, cl. 5.

[6] *See generally* Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868) (stating Import-Export Clause is limited to foreign commerce); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (holding that states could not regulate, under Commerce Clause, those subjects that are national or that require single uniform plan of regulation).

[7] "Seemingly" comprehensive because at its inception, the Import-Export Clause seemed to cover imports and exports between the states as well as in foreign commerce; only in 1868, when *Woodruff v. Parham* was decided, was its apparent breadth curtailed to shipments to and from foreign countries.

In a long-forgotten dissent in an early Import-Export Clause case, Justice Nelson offered a plausible explanation of why the Commerce Clause would not do the job that was assigned to the Import-Export Clause. If, as he foresaw, the Commerce Clause was interpreted to allow the states to levy nondiscriminatory taxes on merchandise regardless of its place of origin, southern products like cotton, tobacco and rice might be subjected by the northern states to an ostensibly neutral tax, though in fact the tax would be tantamount to a discriminatory export tax, since the taxing states produced none of the taxed commodity.[8] Indeed, he viewed the Commerce Clause as merely the ineffectual successor to a provision of the Articles of Confederation,[9] preserving a provision "which the framers of [the Constitution] had rejected as wholly inadequate for the protection of interstate commerce."[10] In Nelson's eyes, the Import-Export Clause was adopted as "a more complete and thorough security to the enjoyment of the privileges of [interstate] commerce."[11]

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[8] *See Woodruff*, 75 U.S. (8 Wall.) at 145 (Nelson, J., dissenting).

[9] The provision to which Justice Nelson referred, Article IV of the Articles of the Confederation, in relevant part, guaranteed that

> the free inhabitants of each of these [s]tates . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each [s]tate shall have free ingress and regress to and from any other [s]tate, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any [s]tate, to any other state of which the owner is an inhabitant . . . .

ART. CONFED., art. IV (U.S. 1781).

[10] *Woodruff*, 75 U.S. (8 Wall.) at 145 (Nelson, J., dissenting).

It is therefore not far-fetched to suggest that as of 1789, the Commerce Clause was a handkerchief thrown over something already covered by a blanket. With the passage of time, of course, the Commerce Clause became vastly more important than the Import-Export Clause (perhaps partly because the latter achieved its goals without much litigation),[12] which neither empowers Congress to act (except in waiving the constraints imposed by the Import-Export Clause on the states), nor limits the state's power to impose non-tax regulations on commerce. Even in its own bailiwick—taxes on imports and exports—the Import-Export Clause yields to the Commerce Clause if the state tax falls on interstate imports and exports, rather than on foreign commerce.[13] By the end of the twentieth century, therefore, the Commerce Clause became the blanket, and the Import-Export Clause a handkerchief, covering only the few discriminatory state taxes that escape the Commerce Clause's coverage.

II. THE EARLY IMPORT-EXPORT CLAUSE CASES

The salient textual differences between the Import-Export Clause and the Commerce Clause[14] are: (1) the Import-Export Clause explicitly bans "imposts or duties on imports or exports," while the Commerce Clause's restrictions on the states are not explicit, but arise only from congressional action or from the dormant Commerce Clause doctrine (these barriers can sometimes be surmounted if the state's interest vis-a-vis the national interest in free trade is sufficiently compelling); (2) the Import-Export Clause prohibits only state fiscal action—the levy of "imposts" and "duties"—while the Commerce Clause can restrict a far wider array of state regulations, including all types of taxes;[15] (3) the Import-Export Clause explicitly authorizes state imposts and duties if Congress consents, whereas the power of Congress to authorize state regulations that would otherwise violate the Commerce Clause—by a so-called "reconveyance"—is a judge-made feature of the Commerce Clause; and (4) the Commerce Clause explicitly covers interstate and foreign commerce, as well as commerce with the Indian tribes, while the Import-Export Clause contains no explicit geographical limits, but as interpreted by the Supreme Court, as explained below, it applies only to foreign commerce.[16]

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[11] *Id.* (Nelson, J., dissenting) (rejecting majority's "foreign commerce" restriction on Import-Export Clause). *See generally* Hinson v. Lott, 75 U.S. (8 Wall.) 148 (1868) (companion case to *Woodruff*).

[12] Today, of course, some states, rather than being tempted to tax imports or exports, seek to encourage them by establishing tax-free zones or other facilities to attract businesses and jobs to their areas.

[13] *See infra* notes 21-23 and accompanying text (discussing Import-Export Clause's inability to protect interstate imports and exports).

[14] Richfield Oil Corp. v. Board of Equalization, 329 U.S. 69, 75 (1946) (stating that "[t]he two constitutional provisions, while related, are not coterminous").

A. *Interstate Commerce and the Import-Export Clause*

In *Brown v. Maryland,* the Supreme Court's first encounter with the Import-Export Clause, Chief Justice Marshall asserted by way of dictum that the Import-Export Clause prohibited state taxes on goods imported from other states, not merely taxes on imports from foreign lands.[17] He viewed this idea, which appears at the end of his discussion of the Commerce

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[15] Dissenting in *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 609-40 (1997), Justice Thomas proposed to eliminate the dormant Commerce Clause doctrine, suggesting that its work could properly be done by the Import-Export Clause, provided it was interpreted, as he argued it should be (*contra Woodruff v. Parham*), to cover interstate, not merely foreign, commerce. *Id.* at 1620 (Thomas J., dissenting). But even if it were thus enlarged, the Import-Export Clause could not be employed to invalidate discriminatory state *regulations,* as distinguished from the specific types of taxes that it covers. *Id.* (noting that Import-Export Clause "seems to prohibit in plain terms . . . the more egregious *state taxes* on interstate commerce . . . ." (emphasis added)). For an analysis and evaluation of Justice Thomas's proposal, see Brannon P. Denning, *Justice Thomas, The Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 COLO. L. REV. 155 (1999).

[16] *See infra* notes 21-23 and accompanying text.

[17] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827) (invalidating state tax on importers of goods produced abroad; "we suppose the principles laid down in this case, to apply equally to importations from a sister [s]tate").

Clause, as an alternative reason for invalidating the Maryland tax; hence his remark might be treated as referring to the Commerce Clause, rather than to the Import-Export Clause. However, the remark has been frequently viewed, seemingly without dispute, as Marshall's construction of the Import-Export Clause.

Marshall's theory was not surprising. The language of the Import-Export Clause is unqualified ("any imposts or duties on imports or exports"), and the pre-1787 complaints that states forced by geography to import goods from outside their borders or to export their locally-produced goods were exploited by neighboring states did not always distinguish between domestic and foreign goods. Marshall's conclusion was not questioned by Chief Justice Taney in the 1861 decision of *Almy v. California*, where Taney struck down a California tax on bills of lading for gold exported from the state and bound for New York.[18] The only question was whether the tax on the bill of lading was, in effect, a tax on the gold itself. "If the tax was laid on the gold or silver exported," Taney wrote, "everyone would see that it was repugnant to the [Import-Export Clause]."[19] Taney then concluded that the tax on the bill of lading was a tax on the goods because it was "in substance the same thing . . . ."[20]

In *Woodruff*, however, Marshall's "casual remark" in *Brown v. Maryland* was repudiated, partly on lexicographical grounds (that the words "import," "export," and "impost" historically referred to foreign commerce unless qualified by "some special form of words to show that foreign commerce is not meant"),[21] and more forcefully, on the ground that tax immunity for goods imported from another state would produce "the grossest injustice" and negate the "equality of public burdens in all our large cities."[22] These hyperbolic claims are puzzling, since, as noted below, the goods would, at best, enjoy only a temporary immunity, which would evaporate once they were unpacked at their destination or commingled there with locally-produced goods. Mr. Justice Miller, who wrote for the Court in *Woodruff*, also held that the challenged tax did not conflict with the Commerce Clause. He reasoned that it was nondiscriminatory, and added that a tax which would "discriminate injuriously against the products of other states or the rights of their citizens" would be unconstitutional under the Commerce Clause, even though it did not violate the Import-Export Clause.[23]

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[18] Almy v. California, 65 U.S. (24 How.) 169, 175 (1860).

[19] *Almy*, 65 U.S. (24 How.) at 173.

[20] *Id.* at 174.

[21] *But see Camps Newfound*, 520 U.S. at 621 (Thomas, J., dissenting) (arguing that scope of Import-Export Clause included interstate commerce).

[22] *Woodruff*, 75 U.S. (8 Wall.) at 137 (stating city tax on sales of merchandise, as applied to auctioneer's sales of goods imported from other states, did not vio-

Thus, restricting the Import-Export Clause to foreign commerce does not liberate the states to enact protective tariffs to restrict the inflow of goods produced in other states. To the contrary, the dormant Commerce Clause doctrine is a shield against such attempts. In *West Lynn Creamery, Inc. v. Healy*, for example, the Supreme Court cited a tariff as "the paradigmatic example of a law discriminating against interstate commerce . . . so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means."[24] The Court's reference to devices to get the results of a tariff "by other means" is a reminder that the Commerce Clause is broader in its coverage than the Import-Export Clause: the latter prohibits only "imposts or duties," while the former was employed in *West Lynn Creamery* to invalidate a subsidy because, in the special circumstances of that case, it was tantamount to a tariff.

B. The Import-Export Clause and the Status of United States Territories and Possessions

Building on *Woodruff*'s reference to "foreign commerce" as the beneficiary of the Import-Export Clause's prohibition, Ohio argued in *Hooven & Allison Co. v. Evatt* that it could levy an

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late Import-Export Clause).

[23] *Id.* at 140.

[24] West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994).

ad valorem tax on merchandise imported from the Philippine Islands, which at that time constituted a territory of the United States rather than a foreign country.[25] While the Supreme Court acknowledged that the courts have "fallen into the habit of referring to imports as things brought into this country *from a foreign country*,"[26] it ruled that the Import-Export Clause's protection shields articles "brought into the United States" even if they did not originate in a foreign country. The Court then traced the constitutional and statutory relationship between the Philippines and the United States, concluding that "the Islands have been given in many aspects, the status of an independent government, which has been reflected in its relations as such with the outside world"[27] and that:

> [t]he national concern in protecting national commercial relations, by exempting imports from state taxation, would seem not to be essentially different or less in the case of merchandise brought from the Philippines . . . for which we have assumed a national responsibility, than in the case of articles originating on the high seas or in foreign countries. Congress is left free by the terms of the [Import-Export] clause to remove the prohibition of state taxation of imports and with it the advantages or disadvantages, whatever they may be, arising from the tax immunity.[28]

Despite the Court's description of the Philippine Islands as a quasi-independent government, the opinion seems to imply that the Import-Export Clause shields imports from all American territories and possessions, even if they enjoy a lesser degree of self-government.[29]

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[25] Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945). This decision was overruled in 1984 on another issue. *See* Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984).

[26] *Hooven & Allison*, 324 U.S. at 669 (emphasis added).

[27] *Id.* at 676 (footnote omitted).

[28] *Id.* at 678-79.

[29] *See id.* at 671 (stating that "there may be imports in the constitutional sense which do not have a foreign origin. . . . [I]t is material only whether [the goods] came from a place *without* the 'country'" in determining whether it is import) (emphasis in original). For the application of the Clause to other territories,

III. THE *MICHELIN TIRE* CASE AND THE DEMISE OF THE ORIGINAL PACKAGE DOCTRINE

In 1976, the Supreme Court startled the tax bar by overthrowing almost a century and a half of case law and adopting a fundamentally new analysis of the Import-Export Clause. Its vehicle was *Michelin Tire Corp. v. Wages*, upholding a Georgia ad valorem property tax on the taxpayer's inventory of imported tires.[30] The tires were held in the company's Georgia warehouse after being transported from its manufacturing plant in France in so-called sea vans (over-the-road trailers with removable wheels), which were hauled from the French factory to a port of embarkation, loaded on ships bound for the United States, refitted with wheels on arrival, and trucked to the Georgia warehouse. The tires, which were not individually packaged, were then removed from the vans, sorted, and stored in the warehouse, pending sale and delivery to the taxpayer's franchised dealers in six southeastern states.[31]

The disputed tax was nondiscriminatory in the sense that it applied to all goods owned by taxpayers on Georgia's once-a-year tax assessment day, whether imported or locally produced, and therefore, it could not be characterized as "a tax [falling] on imports *as such because of their place of origin*."[32] Under the pre-*Michelin Tire* case law, however, the imported tires would have been exempt from even nondiscriminatory taxes until they lost "their character as imports and [became] incorporated into the mass of property of the State."[33] In determining when this crucial transformation occurred, the prevailing

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see, for example Duty Free Shoppers, Ltd. v. Tax Comm'r, 464 F. Supp. 730 (D. Guam App. Div. 1979) (applying Import-Export Clause to Guam). *But cf.* Downes v. Bidwell, 182 U.S. 244 (1901) (holding Puerto Rico not "state"; therefore, federal export ban did not apply). *See generally* STANLEY K. LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTION 3 (1995 & 1997 Supp.).

[30] Michelin Tire Corp. v. Wages, 423 U.S. 276, 302 (1976). For an incisive analysis of this case, see Walter Hellerstein, Michelin Tire Corp. v. Wages: *Enhanced State Power to Tax Imports*, 1976 SUP. CT. REV. 99.

[31] *Michelin Tire*, 423 U.S. at 279-80.

[32] *Id.* at 286 (emphasis added).

[33] *See* Low v. Austin, 80 U.S. (13 Wall.) 29, 34 (1872).

principle was the original package doctrine, which had its origin in an 1827 Import-Export case, *Brown v. Maryland*, and was then adopted and elaborated in determining when goods moving in interstate commerce could be taxed or otherwise regulated by the state of destination.

Briefly stated, the original package doctrine meant that if the Michelin tires had been shipped in containers (*e.g.*, four tires per carton), they could not have been taxed by Georgia (or even by the state of ultimate destination), until they were removed from the cartons or sold by the importer. The governing principles were less clear for goods shipped in bulk because packaging was unnecessary or impracticable (like wheat, iron ore, oil or the Michelin tires), but their immunity from state taxation ordinarily terminated when the importer "broke bulk" by unloading the goods for processing or sale. Fixing the time when the protection ended was also difficult if the goods were imported by manufacturers for use in their businesses.[34] The original package doctrine was much criticized,[35] but in an era when "commerce" was often used to refer to business transactions between wholesale or large-scale "merchants," as distinguished from "trade" between local "shopkeepers" and their customers, the removal of merchandise from long distance shipping containers may well have been a useful and easily enforced way to determine when imported goods became local goods.

The Supreme Court of Georgia, after a lengthy review of the major original package cases, held that the Michelin tires were "incorporated into the mass of [Georgia] property"—so as to be taxable—when the tires "were sorted, segregated by size and style and commingled [by the taxpayer] with other shipments [in the warehouse]."[36] It therefore upheld the tax.

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[34] *See* Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) (upholding ad valorem property tax on imported iron ore when unloaded at place of manufacture), and cases cited therein.

[35] For analysis of the "gossamer threads" making up the cloak of tax immunity for imports, see Melvin G. Dakin, *The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?*, 19 LA. L. REV. 747 (1959); Alexander R. Early & Robert G. Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale From Nondiscriminatory State Personal Property Taxes*, 7 SW. U. L. REV. 247 (1975); Thomas Reed Powell, *State Taxation of Imports—When Does an Import Cease To Be an Import?*, 58 HARV. L. REV. 858 (1945).

The Georgia decision was appealed to the United States Supreme Court, where both sides focused on the ambit of the original package rules.[37] The Court, however, chose to launch its own "independent study" of the constitutional history of the Import-Export Clause, which led it to announce—in the first "modern" Import-Export Clause case[38]—that "a nondiscriminatory *ad valorem* property tax is not the type of state exaction which the Framers of the Constitution . . . had in mind as being an 'impost' or 'duty.'"[39] The Court thereupon overruled *Low v. Austin*, the 1872 elaboration of the original package doctrine, and its corollary, that imported goods are exempt from a nondiscriminatory ad valorem property tax until removed from their original packages or otherwise "incorporated" into the undifferentiated mass of property located in the taxing state.[40]

In place of the long-entrenched original package doctrine, the *Michelin Tire* Court promulgated a three-part test for state taxation of imported goods, corresponding to the three goals that, according to the Court, led the Framers to adopt the Import-Export Clause:

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[36] Wages v. Michelin Tire Corp., 214 S.E.2d 349, 355 (Ga. 1975).

[37] The tax was also imposed on imported tubes stored in the warehouse, which were packaged in corrugated cartons at the factory and still held in these containers on the assessment date. The Supreme Court of Georgia held that these items were exempt from the Georgia tax. *Wages*, 214 S.E.2d at 355 (stating original package doctrine "has been almost universally applied, in a mechanical way, for about 150 years . . . [G]reat weight of authority makes a vast distinction between goods shipped in packaging, such as crates or cartons, and goods shipped in bulk"). This part of its decision was not appealed.

[38] It was so described by *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993).

[39] *Michelin Tire*, 423 U.S. at 283. The opinion, written by Justice Brennan, exudes the spirit of constitutional originalism. Ten years later, Justice Brennan asserted that doctrinaire reliance on the intent of the Framers "is little more than arrogance cloaked in humility." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986).

[40] *See Low*, 80 U.S. (13 Wall.) at 34. According to Professor Schwartz, the Court's decision to reexamine *Low* sua sponte came in response to Justice Brennan's draft opinion in *Michelin Tire*, which questioned *Low*, but did not reexamine it. *See* BERNARD SCHWARTZ, THE UNPUBLISHED DECISIONS OF THE BURGER COURT 342 (1988). The *Michelin Tire* Court argued at length that *Low v. Austin* misunderstood *Brown v. Maryland*, as well as the opinion of Chief Justice Taney (who had argued for the state in *Brown v. Maryland*) in *The License Cases*, 46 U.S. (5 How.) 504 (1847). *Michelin Tire*, 423 U.S. at 282.

> The Framers of the Constitution . . . sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.[41]

The Court then proceeded to apply each of these tests of constitutional validity to Georgia's ad valorem tax on the implicit ground that the Clause prohibits a state tax if, but only if, it has a propensity to interfere with one of the Clause's three objectives.[42] Such a nondiscriminatory property tax does not conflict with the first of the three purposes of the Import-Export Clause (the "one voice" point), according to the Court, because it "does not fall on imports as such because of their place or origin . . . cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and . . . cannot be applied to encourage or discourage imports in a manner inconsistent with federal regulations."[43] Such a tax, therefore, "can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Import-Export Clause's

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[41] *Michelin Tire*, 423 U.S. at 285-86 (footnotes omitted; bracketed numbers added). This explication of the Import-Export Clause is, by its terms, limited to the status of imports. Indeed, the second element of the test is irrelevant in the case of exports because Congress is forbidden to levy export taxes; but the Court extended it to exports in *Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

[42] Though Justice Brennan's articulation and elaboration of the Framers' animating purposes behind the Import-Export Clause assumed the nature of a tripartite "test," the logical conclusion, viz., that taxes failing one or more of the elements of the test were unconstitutional, was implicit, rather than stated explicitly. *Michelin Tire*, 423 U.S. at 286 (stating that nondiscriminatory ad valorem tax, "unlike discriminatory state taxation against imported goods and imports, was not regarded as impediment that severely hampered commerce or constituted form of tribute by seaboard States to the disadvantage of other States"). On this point, see the contrary view of Professor William W. Crosskey, who concluded

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that the remedy of the Framers was intended to bar all taxes:

> This overburdening of out-of-state products [by state taxation] is frequently intentional; but as often, perhaps, it is the result of chance, chance that consists in the unforeseen and frequently unperceived multiple hitting of the same product at different stages in its production, its distribution, or its consumption, by the independently determined, infinitely complicated, and constantly varying duty systems of our several states. From this last cause, if from no other, it would be hopelessly insufficient to interdict such taxes, *only* when the evils in question are found actually to be present. For the presence of the evils is too difficult of detection, and too dependent upon factors constantly varying, for any conditional and qualified interdiction to be effective. The one practicable remedy, in any federal national state, is to forbid such taxes absolutely to the component parts; and thereby to drive those parts–*i.e.*, the states —into other forms of taxation, which are insusceptible of use to attain, and not likely to produce accidentally, the undesired results. And this remedy, it appears, is the one the framers of the Constitution adopted.

1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 297 (1953).

[43] *Michelin Tire*, 423 U.S. at 285-86. For subsequent applications of the *Michelin Tire* case, see R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 131-32 (1986) (holding that state ad valorem tax did not violate Import-Export Clause as applied to imported tobacco stored in customs warehouse awaiting domestic manufacture and sale; that there is "nothing transitory" about tobacco which has reached its destination so that "only payment of customs duty, after the appropriate aging, separates it from entrance into the domestic market"); Los Angeles v. Marine Wholesale Co., 19 Cal. Rptr. 2d 664, 669-71 (Cal. Ct. App. 1993) (stating that Import-Export Clause was not violated by city's nondiscriminatory tax on gross receipts and payroll, as applied to goods stored in federally-regulated customs bonded warehouse); Blue Star Line v. San Francisco, 143 Cal. Rptr. 647, 652-53 (Cal. Ct. App. 1978) (upholding San Francisco payroll tax on employers doing business within city limits under *Michelin Tire* against challenge, under Foreign Commerce and Import-Export Clauses, by steamship lines, agents and stevedore firms engaged in foreign maritime commerce at city's ocean port).

prohibition."[44]

The most obvious state fiscal action that would conflict with the federal government's right to speak in "one voice" in conducting foreign affairs would be an open and avowed state tariff (*e.g.*, a California duty of one dollar per liter of wine imported from France, a measure that might be designed to make local wines seem like a bargain). Such a tax would increase the cost of French wines and thus penalize California's residents[45] without producing any revenue for the state, because the Import-Export Clause requires the net revenues from state taxes on imports and exports to be held for the federal government. With such a tax in place, the President or Secretary of State would no doubt encounter heavy seas in persuading France that the United States is committed to free international trade or that France should lower its duties on U.S.-made products.

But other state taxes, including some that are nondiscriminatory,[46] could also offend a prickly foreign government, particularly if the tax is only superficially nondiscriminatory because it falls on a class of goods that are produced in the taxing state only in small quantities or not at all, such as a North Dakota tax on caviar. Indeed, it is not inconceivable that a foreign government would object to the very tax upheld in *Michelin Tire*, on the ground that its once-a-year feature may charge the importer an undue amount for as little as one day of storage, resulting in an unjustified increase in the price American consumers must pay for goods imported from the complaining government's producers, particularly if the products encounter two or more tax assessment days while en route through a number of states to the customer. In close cases, rather than speculate on the impact of a challenged tax, counsel or the court might want to request the State, Justice or Treasury Department to express an opinion on whether the tax impairs the government's ability to "speak with one voice" in negotiations with foreign governments.[47]

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[44] *Michelin Tire*, 423 U.S. at 286.

[45] This "self-inflicted" wound point was recognized by Chief Justice Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) at 440 (stating that "[w]hen we are inquiring whether a particular act is within this prohibition, the question is not, whether the State may so legislate as to so hurt itself, but whether the act is within the words and mischief of the prohibitory clause").

[46] The Court uses "nondiscriminatory tax" at least twenty-one times in *Michelin Tire*, but does not define the term. In a sense, every tax is discriminatory, since it taxes what it taxes but not what it doesn't tax. For example, the Georgia "nondiscriminatory" ad valorem tax is levied on property held by the taxpayer on the tax-assessment date, but not on property owned on any of the 364 remaining days of the taxable year, and such taxes often distinguish between real and other types of property, between business and non-business property, and between non-profit and for-profit owners.

Turning to the Import-Export Clause's second goal, the Supreme Court asserted in the *Michelin Tire* case that nondiscriminatory taxation like Georgia's ad valorem property tax does not "deprive the Federal Government of the exclusive right to all revenues from imposts and duties on imports and exports, . . . [and hence] deprives the Federal Government of nothing to which it is entitled."[48] Moreover,

> [u]nlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, . . . [nondiscriminatory] property taxes are taxes by which State apportions the cost of such services as police and fire protection among the beneficiaries according to their wealth [and] there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods.[49]

Presumably, police and fire protection was mentioned only as an illustration, and was not intended to imply that importers could not also be required to bear part of the state's entire budget, including the cost of educating its children and its welfare programs for the indigent and homeless.

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[47] But for an example where the Court refused to be bound by the government's opinion that a state law did not affect the government's ability to manage foreign affairs, see Zschernig v. Miller, 389 U.S. 429 (1968); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 163-64 (2nd ed., 1996).

[48] *Michelin Tire*, 423 U.S. at 286-87. The reference in *Michelin Tire* to revenues from export duties, like the similar reference in the Import-Export Clause itself, is puzzling since the federal government has no right, let alone an "exclusive" one, to tax exports by virtue of the Federal Export Tax Clause; thus, a state tax on exports by definition cannot deprive the United States of anything "to which it is entitled."

[49] *Id.*

Unlike the Court's first test of the Georgia tax's validity, the diversion of income test does little to separate tax sheep from tax goats, because *if* a state taxes imports or exports, the Import-Export Clause provides that the net revenue "shall be for the use of the Treasury of the United States;" thus, there is no diversion, except perhaps temporarily. The Court, however, did not mention this point; perhaps its theory was that a state tax is invalid if, *but for* the Import-Export Clause's federal-inurement provision, it would divert import revenues away from the United States. If this theory is accepted, however, it seems to follow that the federal-inurement provision is a dead letter, because any tax that could *in theory* generate import revenue would be invalid *ab initio*, and thus would produce no net revenue to be held by the state for the federal government, except for the crumbs, if any, left on the table by taxpayers who paid the tax and failed to request refunds in time.[50]

Finally, the Court ruled in *Michelin Tire* that Georgia's tax did not violate the third test of constitutional validity (preservation of interstate harmony) that it distilled from the Import-Export Clause's constitutional history, because nondiscriminatory ad valorem property taxes "do not interfere with the free flow of imported goods among the states, as did the exactions by States under the Articles of Confederation directed solely at imported goods."[51] In support of this assertion, the Court noted that importers of goods destined for delivery to inland states can "easily avoid" taxes imposed by seaboard states by using air freight, containerized packaging, rail and water routes, and other means that would bypass the taxing state. To this odd suggestion that a challenged tax might be sanitized by the possibility of easy avoidance, the Court added another point—really no more than a repetition of the tax benefit theory adduced to establish that the Georgia tax surmounted the second policy test—that any increase in the cost to out-of-state purchasers of the taxpayer's tires caused by Georgia's tax was a quid pro quo for the public services supplied by Georgia to importers and non-importers alike. "Ultimate consumers," the Court observed, "should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with these goods."[52]

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[50] Madison described the federal-inurement proviso "as preventing all State imposts." See Brennan's discussion and hypothetical questions, *id.* at 302 n.13. In its potential application to state imposts on exports, the federal-inurement provision conflicts in spirit with the Federal Export Tax Clause, which forbids Congress to tax exports.

[51] *Id.* at 288.

This analysis evidently presupposes that if the states of destination complained about Georgia's ad valorem property tax (which, the Court acknowledged, would increase the cost of imported goods), the complaint would be unwarranted, presumably because the state of destination, if it responded in a reasonable manner, would admit that Georgia's services were worth their cost. The ad valorem property tax is, at best, a rough and ready device to charge for the benefits conferred on the owner by the taxing state, since taxpayer *A* may enjoy 364 days of police and fire protection but pay nothing if its property is not in the state on the once-a-year tax assessment day, while taxpayer *B* may have to pay for 365 days of state services, even though its property tarries in the state for only one day.[53] The Justices did not address this point, perhaps because it was not raised by the taxpayer. If it had been, the Court might have concluded that they would find themselves in a quagmire if they undertook to judge whether taxpayers get their money's worth from the tax burdens they bear.

Moreover, if the intent of the Framers is to be controlling, as the *Michelin Tire* case presupposes, one might wonder whether the inland states, in the era of the Articles of Confederation, complained about taxes levied by seaboard states only if they exceeded the value of the services that the taxing states supplied to the imported goods while they were in transit. If those ancient complaints were in fact qualified by a "tax benefit" concession, the evidence is not adduced in the *Michelin Tire* opinion.

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[52] *Id.* at 289 (footnote omitted).

[53] For apportionment of a California ad valorem tax under the Commerce Clause, based on the number of the taxpayer's cargo containers present in California on average during the taxable year, rather than the number that happened to be in the state on the assessment day, see Japan Line, Ltd. v. Los Angeles, 441 U.S. 434, 445 n.8 (1979).

Continuing its explanation of the third goal of the Import-Export Clause, the Court asserted: "In effect, the [Import-Export] Clause was fashioned to prevent the imposition of exactions which were no more than transit fees *on the privilege of moving through* a State."[54] At first glance, this historical explanation implies that the Import-Export Clause does not prohibit taxes on imported goods by the state of *destination* even if discriminatory or, in the case of exported goods, an export tax by the state of *origin*. But if the Import-Export Clause's function today is solely to outlaw "transit fees" by states *through* which imports and exports pass, a repeal of the Clause would hardly be noticed, because virtually any exaction levied solely for the privilege of transit would be a regulation of foreign commerce in violation of the Commerce Clause. Another way of putting the point is that the brave new approach of the *Michelin Tire* case comes close to depriving, in one fell swoop, both the Import-Export Clause, and the first and second tests of *Michelin*, of any independent function.

It is doubtful, however, that the Supreme Court intended to adopt so radical a "new approach" to the Import-Export Clause. The Court may well decide that the Clause's prohibition extends beyond mere transit fees; certainly, the language chosen by the Framers is broader than necessary to accomplish that limited objective. Conversely, however, the Court may decide that transit fees are not necessarily invalid, leaving room for states to charge for the benefits (*e.g.*, police and fire protection) they provide to goods while in transit and for the expense they impose on the state (*e.g.*, road repairs), even if local entrepreneurs who receive imports or originate exports are exempted from the transit charges because they bear their share of the state's expenses, by paying other taxes that goods in transit escape. Moreover, even an "in transit" tax that for some reason cannot be justified as a quid pro quo for the taxing state's benefits and burdens, might be validated as an inspection fee in appropriate circumstances (*e.g.*, to determine if the goods in transit are dangerously toxic).

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[54] *Michelin Tire*, 423 U.S. at 290 (emphasis added) (footnote omitted); see also the reference in the next sentence to property taxes "on goods which are merely in transit *through the State* when the tax is assessed." *Id.* (emphasis added). For an earlier analysis of this issue, see generally Thomas Reed Powell, *Taxation of Things in Transit* (pt. 1), 7 VA. L. REV. 167 (1920).

IV. "IMPOSTS OR DUTIES ON IMPORTS OR EXPORTS" AFTER *MICHELIN TIRE*

In deciding *Michelin Tire*, the Supreme Court devoted the main body of its opinion to a lengthy explication of the preratification history and objectives of the Import-Export Clause, but it did not explicitly anchor its threefold test of the constitutionality of state taxation to the operative language of the Clause—"No state shall . . . lay any Imposts or Duties on Imports or Exports." Indeed, the Court began its brief analysis of this language by admitting that "the wording of the prohibition of the Import-Export Clause does not in terms except nondiscriminatory taxes with some impact on imports or exports."[55] The Court then pointed out a second, equally obvious, feature of the language used by the Clause—that it does not prohibit *all taxes* on imports and exports, but only "imposts" and "duties"—and the Court contrasted this restricted list of prohibited exactions with the broader power of Congress, created by Article I, Section 8, Clause 1, to "lay and collect taxes, duties, imposts and excises."[56] The issue is further complicated by the reference in the Federal Export Tax Clause (Article I, Section 9, Clause 5) to a "tax or duty" on exports,[57] and in the Uniformity Clause (Article I, Section 8, Clause 1) to "duties, imposts and excises."

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[55] *Michelin Tire*, 423 U.S. at 290.

[56] *See id.*

[57] In *United States v. IBM Corp.*, the Court observed that in *Michelin Tire*, "we left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax, and would be subject to the Export Clause." United States v. IBM Corp., 517 U.S. 843, 857 (1996).

For help in defining "imposts" and "duties," the Court turned in *Michelin Tire* to Professor Crosskey's "persuasive demonstration" that in 1787, these terms were "well understood to be exactions upon imported goods *as imports*."[58] But while Crosskey's book, a veritable lexicon of late eighteenth century legal and business terminology, establishes that the troublesome terms "imposts" and "duties" *sometimes* referred to taxes on "imports as such," it shows that they were also used as labels for taxes on a broad array of other products and events.[59] Moreover, if one were *really* won over by Crosskey's "persuasive demonstration," one would have to reject *Woodruff v. Parham*, and apply the Import-Export Clause to interstate as well as foreign commerce, since that decision was the main impetus for his search for the eighteenth century meanings of "imposts" and "duties" as used in the Import-Export Clause, and his search led to the conclusion that "it would be fantastic to suggest that the Americans of the time could have read the [Import-Export] Clause as applying to 'foreign imports' and 'foreign exports' only."[60]

Rather than follow Crosskey, however, the Court quickly terminated its excursion into eighteenth century lexicography, and implicitly acknowledged that the *Michelin Tire* case could not be settled by consulting the dictionary: "The terminology employed in the Clause—'Imposts or Duties'—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate."[61]

Despite this acknowledgment that the Framers' terminology is ambiguous, the Court reached an eminently plausible conclusion in defining "imposts or duties on imports" as taxes levied on "imports as such" or on "products because of their foreign origin."[62] The Court, therefore, was on sound ground when it ruled that the Import-Export Clause does not shield imports and exports from such broad-based state levies as the ad valorem property tax upheld by *Michelin Tire*, where the challenged tax was not aimed at imports or exports, as such, but reached them only because they happened to be in the line of fire, like innocent bystanders, so to speak.[63]

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[58] *Michelin Tire*, 423 U.S. at 290-91 (emphasis supplied). *See also* 1 CROSSKEY, *supra* note 42, at 296-97.

[59] *See* 1 CROSSKEY, *supra* note 42, at 297-300.

[60] *Id.* at 304.

[61] *Michelin Tire*, 423 U.S. at 293-94.

In its lexicographic analysis of the Import-Export Clause, the *Michelin Tire* Court did not turn its attention to another ambiguity—that the Clause prohibits state taxes only if they are "on" imports or exports. Of course, imports and exports do not pay taxes, people do; but that does not mean that the term "on" is meaningless. Its meaning came before the Court as early as 1827, when Chief Justice Marshall ruled in *Brown v. Maryland*,[64] the Court's first Import-Export Clause case, that a state occupational tax on importers was within the purview of the Import-Export Clause.[65] Rejecting the argument that "this is not a tax upon the [imported] article, but on the person," he wrote:

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[62] *Id.* The defining element "as such" is used at least twice in the *Michelin Tire* opinion, and "foreign origin" appears at least four times. This interpretation of the Import-Export Clause was explicitly rejected in *Low v. Austin*, where the California Supreme Court ruled that certain imported goods were taxable "because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but are included [for taxation] as part of the whole property of its citizens which is subjected equally to *ad valorem* tax." *Low*, 80 U.S. (13 Wall.) at 34. The Court stated further in *Richfield Oil Corp. v. Board of Equalization* that the Import-Export Clause imposed an "absolute prohibition," from which nondiscriminatory taxes could not be exempted, quoting with approval Chief Justice Taney's announcement that "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evidence from the whole instrument, that no word was unnecessarily used, or needlessly added." Richfield Oil Corp. v. Board of Equalization, 329 U.S. 69, 77 (1946) (quoting Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840)) (holding state retail sales tax invalid as applied to oil pumped from taxpayer's storage tanks into vessel for shipment to New Zealand). Since the Clause explicitly granted only one exemption from its prohibition (for the state's necessary inspection expenses), the Court ruled that no other exemption (*e.g.*, for nondiscriminatory taxes) could be applied. *Richfield Oil Corp.*, 329 U.S. at 76. *But see* Peck & Co. v. Lowe, 247 U.S. 165, 174, 175 (1918) (holding that Federal Export Tax Clause does not prohibit federal income tax on net income from export sales, (1) since "[t]he tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. . . . [W]hat is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins;" and (2) federal income tax "is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income").

[63] *See supra* notes 32-40 and accompanying text. *Michelin Tire* supports the idea that imports and exports in "transit" through a state might be immune from taxation even if the tax is nondiscriminatory. *See supra* notes 32-40 and accompanying text.

> All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do because it is prohibited by the constitution.[66]

Chief Justice Marshall's lead was followed by later courts, which similarly applied the Import-Export Clause to taxes on activities so connected with the goods that the levy could be plausibly described as a tax "on the article itself." Thus, in *Almy v. California*, the Court invalidated a California stamp tax on bills of lading for the transportation of gold or silver, because the intention was "to lay a tax on the gold and silver exported, and not upon articles of any other description."[67] In

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[64] 25 U.S. (12 Wheat.) 419 (1827).

[65] *Brown*, 25 U.S. (12 Wheat.) at 447-48.

[66] *Id.* at 444. The rejected argument was advanced by Roger Taney, counsel for Maryland, who stuck to his guns and resuscitated the claim when he succeeded Marshall in the Chief Justice's chair. *See The License Cases*, *supra* note 40.

[67] Almy v. California, 65 U.S. (24 How.) 169, 174 (1861). Although decided before, the Court, in *Woodruff v. Parham*, confined the prohibition to goods shipped

Thames & Mersey Marine Insurance Co. v. United States,[68] the Court extended the constitutional prohibition a bit further to encompass policies of marine insurance on exported goods.[69] The taxable document in each of these cases was readily viewed as a "proxy" for the goods themselves, since in commercial practice the bill of lading and accompanying policy of marine insurance are often essential to a legally effective transfer of the goods.[70]

In 1951, however, the Court drew back from this expansive construction in *Canton Railroad Co. v. Rogan*,[71] which involved a state tax on the gross receipts of a railroad that operated a marine terminal, which handled goods arriving from abroad or consigned to foreign buyers.[72] The Court acknowledged that "the prohibition of the Import-Export Clause against taxes on imports and exports involves more than an exemption from taxes laid upon the goods themselves,"[73] but it rejected the taxpayer's claim that "its handling of the goods, which are destined for export or which arrive as imports"[74] immunized it against a state gross receipts tax:

> The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them or manufacturing them.[75]

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to or from foreign countries, *Woodruff* did not undermine the *Almy* proposition that the tax was "on" the property covered by the taxed document. *Woodruff*, 75 U.S. (Wall.) at 137.

[68] 237 U.S. 19 (1915).

[69] *Thames & Mersey Marine Ins. Co.*, 237 U.S. at 27.

[70] *Id.* at 26. *See* United States v. IBM Corp., 517 U.S. 843, 879-80 (1996) (Kennedy, J., dissenting) (explaining concept of "a proxy for taxing the goods").

[71] 340 U.S. 511 (1951).

[72] *Canton R.R. Co.*, 340 U.S. at 512.

[73] *Id.* at 514.

[74] *Id.*

[75] *Id.* at 515.

The Court went on to hold that a tax on the taxpayer's receipts from renting a crane to stevedoring companies, who used the crane in loading and unloading imports and exports, was too remote from the goods to be invalidated by the Import-Export Clause.[76] Intimating that a tax on the activities of the stevedoring firms might qualify for protection, the Court concluded "that any activity *more* remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process."[77] In still another encounter with the pestiferous preposition "on," in *Itel Containers International Corp. v. Huddleston*,[78] the Court ruled that a Tennessee sales tax imposed on the proceeds of leasing cargo containers for use exclusively in international shipping was not prohibited by the Import-Export Clause, for the reason that it was "levied on leases transferring temporary possession of containers to third parties . . . not on the containers themselves or on the goods being imported in those containers."[79]

The elusive preposition "on" also appears in the Federal Export Clause, prohibiting any federal tax or duty "on articles exported from any state," and the similarity of language between this Clause and the Import-Export Clause has resulted in what the Supreme Court has called "our longstanding parallel interpretations of the two Clauses."[80] In *United States v. IBM Corp.*, a Federal Export Clause case, the Court pointed out that it had "struck down taxes that were not asserted directly on goods in export transit, but which [it] found to be so closely related as to be effectively a tax on the goods themselves," but added that it had never "carefully defined how we decide whether a particular federal tax is sufficiently related to the goods or their value to violate the Export Clause."[81] The Court seemed poised to reconsider its holding in *Thames & Mersey Marine Insurance Co. v. United States*, a leading example of the "closely related" approach; but the government did not challenge that decision; and in the interest of *stare decisis,* the Court did not disturb it.[82]

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[76] *Id.*

[77] *Id.* (emphasis added). The *Canton Railroad Co.* case was followed by *Department of Revenue v. Association of Wash. Stevedoring Cos.*, which narrowed the "in transit" exception suggested by *Michelin Tire* by denying Import-Export Clause immunity to a state tax that "does not fall on the [imported or exported] goods themselves [but] only on the business of loading and unloading ships." 435 U.S. at 755.

[78] 507 U.S. 60 (1993).

[79] *Itel Containers Int'l Corp.*, 507 U.S. at 77 (Justice Scalia concurring only in judgment on this issue; Justice Blackmun dissenting on other grounds).

[80] *IBM Corp.*, 517 U.S. at 853.

V. "EXPORTS" AFTER *MICHELIN TIRE*

Before *Michelin Tire*, goods shipped to foreign shores gained immunity from state taxation under the Import-Export Clause upon their "entrance into the export stream."[83] This was a shorthand expression for a principle set out in *Coe v. Erroll,*[84] which held that under the dormant Commerce Clause doctrine,

> goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey.[85]

For exports, this boundary line is the counterpart of the original package doctrine as applied to imports, which was not suitable for exported goods, because they are often packed by the manufacturer in identical containers, whether they are to be shipped to foreign countries, other states, or even other locations within the state of manufacture. Since identically-packaged goods cannot be distinguished at this point from "the general mass of property in the state [of manufacture]," it was necessary to find an alternative starting line for exports to serve as the analogue of the original package rule for imports.[86]

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[81] *Id.* at 855 n.3.

[82] *Thames & Mersey Marine Ins. Co.*, 237 U.S. at 27 (1915).

[83] *See* Kosydar v. National Cash Register Co., 417 U.S. 62, 67 (1974), and cases there cited; *see also IBM Corp.*, 517 U.S. at 871 (complaining of "factual morass of determining when exportation has begun"); Leslie W. Abramson, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C. L. REV. 59 (1975). For the effect of interruptions en route, see *Champlain Realty Co. v. Brattleboro,* 260 U.S. 366 (1922).

[84] 116 U.S. 517 (1886).

[85] *Coe*, 116 U.S. at 527.

Like the original package rule, the "stream of export" rule engendered some close cases.[87] A defense of this principle can be found in *Kosydar v. National Cash Register Co.*,[88] upholding a state ad valorem tax on machines built to foreign buyers' specifications and awaiting shipment abroad, with possession and title still in the manufacturer, even though exportation was virtually certain. Movement to foreign shores, however, had not started, and the Court observed:

> It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. The Court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, "it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question."[89]

When *Michelin Tire* repudiated the original package rule for imports in favor of a new approach to the Import-Export

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[86] *Id.* at 525.

[87] *See, e.g.*, Richfield Oil Corp. v. Board of Equalization, 329 U.S. 69, 82-83 (1946) (invalidating California sales tax as applied to oil produced in California by taxpayer and shipped by pipeline to its storage tanks in California harbor, then pumped into oil tanker for delivery to New Zealand; transfer of oil from taxpayer's storage tanks into hold of vessel was start of oil's "export journey"), and cases there cited.

[88] 417 U.S. 62 (1973).

[89] *Kosydar*, 417 U.S. at 71 (quoting *Coe*, 116 U.S. at 526). In addition, the Court reiterated its support for previous decisions holding that "the protections of the Import-Export Clause are not available until the article . . . begins its physical entry into the stream of exportation." *Id.* Thus tax immunity is negated based on subjective factors like a manufacturer's intent to export.

Clause, by which a challenged state tax was tested to ascertain if it threatened the evils which the Clause was intended to prevent, disenchantment with the "stream of export" rule—the original package rule's counterpart—was almost a foregone conclusion. A turnabout came only two years after *Michelin Tire*, when the Court announced in *Washington Department of Revenue v. Association of Washington Stevedoring Cos.* that "the *Michelin* approach should apply to taxation involving exports as well as imports."[90] *Michelin Tire* dealt only with a property tax, while the *Washington Stevedoring* tax was levied on business income, but the Court did not distinguish between them on this flimsy ground, perhaps because it assumed that the taxation would be reflected in the price of both the goods that were taxed in *Michelin Tire* and those that were handled by the taxed stevedoring firms in *Washington Stevedoring*. In extending its new import rule to exports, the Court might have pointed out that the Import-Export Clause forbade taxes on exports for the same reason it barred import taxes, *i.e.*, to dampen down the commercial strife between the seaboard states and their inland neighbors; thus, North Carolina was "a patient bleeding at both arms"[91] because Virginia and South Carolina, with their port cities, could levy import duties on foreign goods bound for North Carolina and export duties on North Carolina's tobacco en route to foreign lands.

The right of the state of origin to tax its *own* exports, however, seems to require separate analysis, since such a levy would not, absent unusual circumstances, disturb the exporting state's neighbors or deprive the federal government of import revenues, two of the results that the Import-Export Clause, as interpreted by *Michelin*, was intended to prevent. Raising the cost of export goods to foreign customers may undermine the federal government's power "to speak with one voice when regulating commercial relations with foreign governments,"[92] and thus frustrate the first goal of the Import-Export Clause. Moreover, a state may thus interfere with the constitutional authority of Congress to regulate foreign commerce, in violation of the dormant Commerce Clause principle.

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[90] Washington Dep't of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 758 (1978), *overruling* Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937) (establishing decision based on Commerce Clause, but foreign commerce aspect could have been based on Import-Export Clause).

[91] *See supra* note 4 and accompanying text.

VI. GOODS IN TRANSIT

In the *Michelin Tire* case, the Supreme Court came close to ruling that state taxes on imports and exports are never subject to the prohibitions of the Import-Export Clause if the goods are taxed only as part of a broader nondiscriminatory tax base, such as Georgia's general ad valorem property tax; but the Court drew back at the last minute by hinting that the constitutional prohibition might apply to "nondiscriminatory property taxes on goods that are merely in transit through the State when the tax is assessed."[93] This tentative reservation did not embrace the tires in *Michelin Tire* because, the Court ruled, they were "no longer in transit," but were instead stored in a distribution warehouse that was operated "no differently than would be a distribution warehouse operated by a wholesaler dealing solely in domestic goods.[94]

The *Michelin Tire* in-transit reservation evidently assumes that the goods remain "imports" until they arrive at their ultimate destination. However, the Court also appears to assume that a nondiscriminatory tax can meet the threshold *Michelin Tire* requirement that the tax be levied on imports or exports *as such* or *because of their foreign origin*. Moreover, the "in transit" reservation requires a qualification to avoid going too far. For example, would it prohibit a nondiscriminatory state inheritance tax on a case of jeroboams of Lafitte Rothschild, vintage 1962, if the owner died while the wine was en route from Bordeaux to Chicago, and his will left the prized cargo to Walter Hellerstein?

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[92] *See supra* notes 41-47 and accompanying text.

[93] *Michelin Tire*, 423 U.S. at 290. For a discussion of ambiguities in defining the term "in transit," see Hellerstein, *supra* note 30, at 122-26. In *United States v. IBM Corp*, involving the constitutional prohibition of a federal tax on exports, the government argued that the Supreme Court's "Import-Export jurisprudence now permits a State to impose a nondiscriminatory tax directly on import or export transit." *IBM Corp.*, 517 U.S. at 861-62. This reading of the case law was rejected by the Court, though by way of dictum. *Id.*

[94] *Michelin Tire*, 423 U.S. at 302.

Two years after deciding *Michelin Tire*, the Court had an opportunity to expand on its tantalizing hint about taxes on goods in transit when it decided *Department of Revenue v. Association of Washington Stevedoring Companies*.[95] Upholding a Washington tax on the gross income or receipts of "every person engaging within this state in any business activity," as applied to stevedoring firms that engaged in interstate and foreign commerce by loading and unloading ships in Puget Sound,[96] the Court followed *Michelin Tire*'s iconoclastic lead by overruling two cases, one of them more than forty years old. However, it reserved judgment on *Michelin Tire*'s "in transit" suggestion.

First, the Court rejected the taxpayers' claim that the tax was unconstitutional under the dormant Commerce Clause doctrine. Looking to "the practical effect of the exaction," the Court pointed out that it had "repeatedly . . . sustained taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State"; thus, the Washington tax satisfied the standard Commerce Clause mantra of constitutionality—that "interstate commerce must bear its fair share of the state tax burden."[97]

The Court then proceeded to examine the stevedoring firms' claim that the tax violated the Import-Export Clause, a challenge that applied only to their activities in foreign commerce. The issue was not settled by the Court's Commerce Clause ruling, which unlike the Import-Export Clause, called for a balancing of the interests of the taxpayers and the state. Applying the *Michelin Tire* analysis,[98] the Court concluded that the Washington tax did not generate any of the evils that the Import-Export Clause was intended to prevent:

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[95] *See supra* note 90.

[96] *Association of Wash. Stevedoring Cos.*, 435 U.S. at 738 n.4. *See also* Diamond Shamrock Ref. & Mktg. Co. v. Nueces County Appraisal Dist., 876 S.W.2d 298 (Tex. 1994).

[97] *Association of Wash. Stevedoring Cos.*, 435 U.S. at 750.

> First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. . . . No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.
>
> Second, the effect of the Washington tax on federal import revenues is identical to the effect in *Michelin Tire*. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct ad valorem property tax [upheld in *Michelin Tire*] on the imported goods themselves.
>
> Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause. . . . The third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State.[99]

In this formulation of the third test of constitutionality, the *Washington Stevedoring* case departed from the third Import-Export Clause test as promulgated by *Michelin,* and substituted a test derived from a 1977 Commerce Clause case, *Complete Auto Transit, Inc. v. Brady.*[100] That case tested state taxes against what the *Washington Stevedoring* Court termed the Commerce Clause's "four safeguards" of interstate harmony—"the prohibition of discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits."[101] This process of constitutional homogenization resulted a year later in a judicial merger of *Michelin Tire*'s first test of constitutionality under the Import-Export Clause, with the test applied under the foreign commerce component of the dormant Commerce Clause doctrine. In *Japan Line, Ltd. v. County of Los Angeles*, the Court held that the controlling standard under both provisions is whether the state tax prevents the United States from "speaking with one voice" in conducting its commercial relations with foreign governments.[102]

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[98] It is not clear that the Washington tax could be described as levied on "imports as such" or "exports as such," as required by *Michelin Tire*, since the tax evidently applied to the taxpayer's receipts from handling cargo in Puget Sound, whether the shipments involved foreign, interstate, or intrastate commerce.

[99] *Id.* at 754-55 (citations omitted). Although the Court refers in its second point only to the imported goods handled by the stevedoring firms, the tax on their services in handling exports did not undermine this goal because it did not divert any funds to which the federal government is entitled; the Constitution forbids federal taxation of exports. *See id.* at 759.

This evidently leaves *Michelin Tire*'s second test of constitutionality—diversion of import revenues from the federal government—as the only unique contribution of the Import-Export Clause. The stevedoring companies argued that the three-part standard of constitutionality promulgated by *Michelin Tire* did not apply to them, in any event, because the merchandise loaded and unloaded by them was still "in transit," whereas the Georgia tax upheld in *Michelin Tire* was on goods "no longer in transit."[103] But in *Washington Stevedoring*, the Court treated this distinction as irrelevant because the challenged Washington tax "[did] not fall on the goods themselves," and "the *Michelin Tire* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service [*i.e.*, loading and unloading] distinct from the goods and their value."[104] This distinction (enunciated without explanation) seems to imply that *Michelin Tire*'s "in transit" reservation applies only if the taxpayer is the owner of the goods, as in the *Michelin Tire* case, even though the Court notes that pre-*Michelin Tire* cases "had assumed that all taxes on imports and exports *and on the importing and exporting process itself* were banned by the [Import-Export] Clause."[105]

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[100] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[101] *Association of Wash. Stevedoring Cos.*, 435 U.S. at 761.

[102] *Japan Line, Ltd.*, 441 U.S. at 434, 453-54.

[103] For this aspect of *Michelin Tire*, see *supra* note 48-54 and accompanying text.

[104] *Association of Wash. Stevedoring Cos.*, 435 U.S. at 757 (footnote omitted).

Once the Court ruled that state taxes were prohibited by the Import-Export Clause only if levied on imports or exports "as such," it came close to depriving all three *Michelin Tire* tests of any operative significance because (1) taxes levied on imports or exports "as such" seem ipso facto to threaten either the first and third evils in the case of exports, or all three in the case of imports;[106] while (2) taxes that are not levied on imports "as such" do not qualify for immunity because they do not meet the threshold definitional requirement of the Clause, with the possible exception of taxes on imports or exports in transit.[107] But if this reserved possibility is ultimately recognized by the Court, it would evidently have to rest on the curious and unexplained theory that a tax threatening one or more of the evils described by *Michelin Tire* is prohibited by the Import-Export Clause even if it is not a tax on imports or exports "as such." This in turn suggests that the terminology used in the Clause was even more ambiguous than the Court acknowledged in *Michelin Tire*.[108]

Since *Washington Stevedoring*, the Supreme Court has addressed only one case alleging that a state tax violated the Import-Export Clause because it was levied on exports. In *Itel Containers International Corp. v. Huddleston*, the taxpayer alleged that Tennessee's general sales tax violated the Import-Export Clause, to the extent that it was imposed on income from leasing cargo containers for exclusive use in international commerce.[109] Without commenting on the fact that the tax was levied on an extremely broad spectrum of transactions (the "transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration"), so that it could hardly be described as imposed on imports or exports "as such,"[110] the Court held that it did not threaten to produce either the first or third of the three evils identified in *Michelin Tire* (interference with the nation's ability to speak "with one voice" in foreign commercial matters and the disturbance of harmony among the states).[111] The Court then turned to the tax's viability under the second *Michelin Tire* test (diversion of import duties from the federal government).[112] This evil, the Court held, was not produced by the Tennessee tax, because "it is not a tax on importation or imported goods, but a tax on a business transaction occurring within the taxing state," and hence it "does not divert import revenue from the Federal Government."[113]

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[105] *Id.* at 752 (emphasis added).

[106] *See* Hellerstein, *supra* note 30, at 115.

[107] For *Michelin's* reservation of this exception, see *supra* notes 55-63 and accompanying text.

[108] *Michelin Tire*, 423 U.S. at 293.

[109] 507 U.S. 60, 63 (1993). The taxpayer also attacked the tax as violating the foreign commerce component of the Commerce Clause and the Supremacy Clause, the latter challenge being based on an alleged violation of federal regulations

Finally, the Court rejected the argument that the tax violated "the prohibition on the direct taxation of imports and exports 'in transit.'" Hinting that this prohibition, which had been applied in the *Richfield Oil* case,[114] had been "altered" by the approach adopted in *Michelin Tire*, the Court held that it did not apply to the case before it. The Court stated, "Tennessee's sales tax is levied on leases transferring tempo-

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relating to containers, and of two international conventions to which the United States is a party. *Itel Containers Int'l Corp.*, 507 U.S. at 63. Both claims were rejected. *Id.* at 69, 75.

[110] *See id.* at 69. In rejecting the taxpayer's claim that the tax was preempted by two international conventions, however, the Court said explicitly that "[t]he tax is a sales tax of general application that does not discriminate against imported products either in its purpose or effect [and] its assessment bears no relation to importation whatsoever." *Id.* This pronouncement by itself should have doomed the taxpayer's Import-Export Clause claim.

[111] *Id.* at 77-78. In holding that these two evils were not produced by the tax, the Court treated the *Michelin Tire* requirements as identical with the requirements of the foreign commerce component of the Commerce Clause. *See supra* notes 89-90 and accompanying text.

[112] *Id.*

[113] *Id.* at 77.

[114] *See supra* note 62.

rary possession of containers to third parties in Tennessee; it is not levied on the containers themselves or on the goods being imported in those containers."[115]

In *Louisiana Land & Exploration Co. v. Pilot Petroleum*, the Fifth Circuit Court of Appeals squarely confronted the possible application of the Import-Export Clause to prohibit a nondiscriminatory tax if imposed on goods in transit, an issue on which the *Michelin Tire* Court reserved judgment.[116] The *Pilot Petroleum* case involved a nondiscriminatory Alabama sales tax on the sale of jet fuel oil, which was delivered by the seller to a foreign oil tanker anchored in the port of Mobile, Alabama for export to Canada.[117] Relying both on a similar pre-*Michelin Tire* "in transit" decision and on the *Michelin Tire* reservation, the Court held that the Alabama tax "is an impost upon an export within the meaning of the Import-Export Clause, and is therefore unconstitutional."[118]

In reaching this conclusion, the Fifth Circuit noted that the Alabama tax was a "direct tax that is levied on the goods themselves," distinguishable from both the "indirect" tax upheld in *Michelin Tire* "on stored inventory which includes imported or exported products," and from the *Washington Stevedoring* tax "on a business or occupation which is related to the importation or exportation process."[119] The Court, however, did not explicitly address the *Michelin Tire* comment that the Import-Export Clause "was fashioned to prevent the imposition of exactions which were no more than *transit fees on the privilege of moving through a State.*"[120] It takes some stretching to attach this label to the Alabama tax, which (1) was imposed on sales of jet fuel, whether for use in Alabama or for shipment to other states or foreign countries; and (2) would not apply if the seller retained ownership of the exported fuel until it arrived at its foreign destination. A dissenting judge offered a cogent defense of the Alabama tax, though his pioneering rationale has not yet caught hold:

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[115] *Itel Containers Int'l Corp.*, 507 U.S. at 77.

[116] Louisiana Land & Exploration Co. v. Pilot Petroleum Corp., 900 F.2d 816 (5th Cir. 1990) (divided court), *cert. denied, sub nom.* Department of Revenue v. Pilot Petroleum Corp., 498 U.S. 897 (1990). The tax was imposed on "every distributor, refiner, retail dealer, [and others] of gasoline or any substitute . . . sold for use as a fuel to propel aircraft." *Louisiana Land & Exploration*, 900 F.2d at 817 n.1.

[117] *Id.* at 817.

[118] *Id.* at 821.

[119] *Id.*

[120] *Michelin Tire*, 423 U.S. at 290 (emphasis added).

> The majority is surely correct that most oil exports are by tanker and that only coastal states can tax this form of commerce; by the same token it is only coastal states that bear the regulatory, administrative and, increasingly, environmental costs of this commerce. The Framers did not intend such states to bear all these costs, and this nondiscriminatory tax imposed at the Mobile, Alabama port on fuel, which happened to be exported, is not unconstitutional.[121]

It is doubtful that this invocation of the intent of the Founders is rooted in history; but if the Import-Export Clause is sufficiently ambulatory to take account of today's realities, the argument is persuasive.

The "in transit" issue was examined at length by the Supreme Court of Texas in *Virginia Indonesia Co. v. Harris County*, involving the validity of a county ad valorem personal property tax on goods purchased by a Delaware agent for an Indonesian joint venture ("VICO").[122] Under the sales contract, the vendors shipped the goods to an independent Houston export packer for inspection and, assuming conformity to the contract specifications, the goods were then packed and shipped abroad by the next available vessel. The export packer held the goods for no more than forty-five days, but the period could be as long as 175 days if the goods were damaged or defective or if approval for import into Indonesia was delayed; some goods remained in the Houston facility throughout the year.

Calling attention to the distinction in *Washington Stevedoring* between a "direct tax on goods and a tax on the business of handling goods," and to *Michelin Tire*'s reservation of judgment with respect to direct state taxes on imports and exports in transit, the Texas court observed that *Michelin Tire* "appears to preserve bright-line immunity for goods in the stream of export."[123] Moreover, the Texas court announced that since the "Supreme Court has not overruled *Coe v. Erroll* or any of its progeny, we apply the long-standing rule that a tax on goods in the export stream of commerce violates the Import-Export Clause."[124] The Texas court then examined the reasons for holding the goods in Houston en route from the vendors to Indonesia, concluding that the goods remained in transit under the long-established *pre-Michelin* principle that the continuity of transit is not interrupted by stoppages "due to the necessities of the journey or for the purpose of safety and convenience in the courts of the movement," as distinguished from transit-breaking delays for such purposes as further processing or the receipt of orders.[125]

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[121] *Louisiana Land & Exploration*, 900 F.2d at 822-23 (Jolly, C.J., dissenting).

[122] Virginia Indonesia Co. v. Harris County, 910 S.W.2d 905 (Tex. 1995). The case was cited with approval by the Supreme Court in *United States v. IBM Corp.*, 517 U.S. 843, 862 (1996).

Rather than stopping at this point, however, the Texas court ruled that the tax imposed on VICO's goods violated the "one voice" policy set out in *Michelin Tire* by interfering with the United States' commercial relations with Indonesia, which might "turn to other countries for its imported goods, or might engage in retaliatory taxation of its own exports destined for the United States."[126] The Court rejected the taxpayer's arguments that (1) the in-transit status of the goods is a "threshold" issue, and (2) if the goods were still in transit despite the delay in Houston, "it is unnecessary to analyze whether the tax impinges upon the *Michelin Tire* policies."[127] Two justices dissented in *Virginia Indonesia*, asserting that:

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[123] *Virginia Indonesia*, 910 S.W.2d at 911. The "stream of export" standard was, for exports, the counterpart of the now defunct original package rule promulgated for imports.

[124] *Id.* at 912.

[125] For a discussion of the "interruption/continuity" of journey cases, see Diamond Shamrock Refining & Mktg. Co. v. Nueces County Appraisal Dist., 876 S.W.2d 298, 302 (Tex. 1994) (holding oil imported into state from foreign country, reaching its ultimate destination in-state, may be taxed despite fact it is still "in transit" *within* taxing state).

[126] *Virginia Indonesia*, 910 S.W.2d at 915.

[127] *Id.* at 910.

> [T]he United States Supreme Court has abandoned the exclusive use of the in-transit rule and related condensations of constitutional principles like "original package" and "export stream" as accurate or adequate substitutes for the principles themselves. The fundamental difference in Import-Export Clause jurisprudence since *Michelin Tire* . . . is that the constitutional provision's limit on state taxation is now defined in every instance by the actual policies which support the limits required by *Michelin Tire*'s predecessor cases, to which the doctrine of *stare decisis* requires obedience.[128]

VII. THE IMPORT-EXPORT CLAUSE AND STATE INSPECTION DUTIES

A. Inspection Charges

The Import-Export Clause's prohibition of state imposts and duties on imports and exports exempts charges that are "absolutely necessary for executing [the state's] inspection laws." In *Gibbons v. Ogden*, Chief Justice Marshall observed:

> The object of inspection laws is to improve the quality of articles produced by the labour of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state and not surrendered to the general government; all which can be most advantageously exercised by the states themselves.[129]

In Marshall's day, state inspection laws embraced everything from pork to barrels, gunpowder to firewater, and lumber to fish; they regulated every aspect of these and other commodities, including the "quality of the article, form, capacity, dimensions, weight or package, mode of putting up, and marking and branding of various kinds."[130] In the words of an early Pennsylvania statute, "It is the duty and interest of all governments to prevent fraud, and promote the interests of just and useful commerce."[131] Evidently, the purpose was often less to protect local consumers than to establish and maintain the state's reputation for supplying products of high quality to markets in other states and abroad.[132]

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[128] *Id.* at 915-16 (Hecht & Owen, JJ., dissenting).

[129] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824). See also the references to state inspection laws in Chancellor Kent's opinion in *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. Sup. Ct. 1812).

Commenting in *McCulloch v. Maryland* on the scope of the Necessary and Proper Clause of the Constitution, Chief Justice Marshall pointed out that "necessary," in the affairs of the world, "frequently imports no more than that one thing is convenient, or useful, or essential to another"; but that by adding the word "absolutely" in phrasing the Import-Export Clause, the Framers intended to change "materially" the meaning of the naked word "necessary."[133] Given this view of the solemnity of the phrase "absolutely necessary," as well as the ubiquity of the early state codes for enforcing inspection laws, there is a surprising paucity of litigation by aggrieved importers and exporters.[134] This may reflect a fear that if success in court produced a lower fee, there would be an offsetting reduction in the state's staff of inspectors, resulting in costly delays in meeting commercial schedules.

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[130] *See, e.g.*, the laws cited by counsel for the respondent in *Gibbons*, 22 U.S. (9 Wheat.) at 115-125; for the matters covered by inspection laws, see Turner v. Maryland, 107 U.S. 38 (1883) (holding that inspection fee charge "appears to be a charge for services properly rendered," not in violation of Import-Export Clause, or wrongful state interference with interstate commerce). For an extended list of commodities subject to inspection in 1883, see *Turner*, 107 U.S. at 55-58, notes (a)-(c).

[131] 1 Dallas Pennsylvania Laws 883. *See generally* LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860, at 204ff (1948).

[132] *See* Neilson v. Garza, 17 F. Cas. 1302, 1303 (C.C.E.D. Tex. 1876) (No. 10,091) (Bradley, C.J.) (stating "no doubt the primary and most usual object of inspection is to prepare goods for exportation to preserve the credit of our exports in foreign markets").

State laws still evince a strong interest in the protection of the reputation of their products, though the method of protection differs somewhat. Recently, many states have enacted so-called "food disparagement" statutes that create "a cause of action for damages from disparaging statements or dissemination of false information about the safety of the consumption of food products." David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 196 (1998) (citing examples of such statutes from thirty-one states that either passed or are considering food libel laws). Invoked most famously (and unsuccessfully) against talk show host Oprah Winfrey, the constitutionality of these statutes is hotly debated.

[133] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414-15 (1819).

In one of the few Import-Export Clause cases asserting that a state's inspection charges were excessive, Justice Bradley, sitting on circuit, expressed doubts about how such an allegation could be tried, observing that submitting it to a jury "might give rise to great diversity of judgment, the result of which would be to make the law constitutional on one day, and in one case, and unconstitutional another day, in another case."[135] Quoting the final clause of the Import-Export Clause—"all such laws shall be subject to the revision and control of [C]ongress"—he then ruled that the allegedly excessive charge "must stand until [C]ongress shall see fit to alter it."[136]

These remarks were quoted with approval in a later Supreme Court decision upholding a North Carolina fee for inspecting imported agricultural fertilizer, but the Court said that "we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected as to justify the imputation of bad faith . . . ."[137] The Court also observed that if "the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge."[138] (Of course, a correction that was prospective only would not necessarily inure to the benefit of the complaining taxpayer.) Another Supreme Court case, challenging the amount charged by North Carolina for inspecting imported kerosene and other illuminating oils, stated that if the charge was excessive, the Court would indulge

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[134] In a few cases, states have defended a challenged fee on the theory that it was not regulation interfering with interstate commerce, which would be a violation of the Commerce Clause, but an inspection law. *See, e.g.,* Hale v. Bimco Trading, 306 U.S. 375 (1939) (treating excessive "inspection" fee on out-of-state goods as unconstitutional tax on interstate commerce); Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 488 (1888) (same); *see also* Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) (holding tax on intoxicants invalid).

[135] *Neilson*, 17 F. Cas. at 1303.

[136] *Id.*

[137] Patapsco Guano Co. v. North Carolina, 171 U.S. 345, 354 (1898).

[138] *Patapsco Guano*, 171 U.S. at 354.

> the presumption . . . that in the orderly conduct of the public business of the State the necessary correction will be made to cause the act to conform to the authority possessed [by the state], which is to impose a fee solely to recompense the State for the expenses properly incurred in enforcing the authorized inspection.[139]

The Court refused to discuss what relief would be granted if the state failed in this duty of correction, noting that the suit was commenced immediately after the law was passed, too soon for the accumulation of experience on the relationship of the charge to the state's expenses. Whether by intent or inadvertence, however, it did not quote or refer to the counsel of despair in the two earlier cases—that Congress was the ultimate arbiter of whether the charge was excessive.

Still another case held out more hope for the enforcement of the Import-Export's "absolutely necessary" criterion, without an inquiry—obviously distasteful to the federal judiciary—into the hearts and minds of the state legislators, even though the case arose under the interstate commerce aspect of the Commerce Clause, rather than under the Import-Export Clause itself. In *Cleveland Refining Co. v. Phipps & Phipps*, a three-judge district court invalidated an Ohio fee for inspecting out-of-state petroleum products on a showing that the fee exceeded the state's expenses by about sixty-three percent and that this excess was increased over time; the court ruled that the fee interfered unjustifiably with interstate commerce.[140] The state sought to salvage its law by arguing that the aggregate amount collected, which covered both interstate and intrastate shipments, should be allocated between the two categories, and that this would show that the interstate shipments were inspected at a loss to the state. The court rejected this proposal to bifurcate the charges, on the ground that the state law "makes no such separation of cost, nor does it afford any means for so doing."[141] (The Court did not comment on whether this refusal would be appropriate if a taxpayer offered to show that the state was inspecting domestic products at a loss and recouping the deficiency by overcharging out-of-state shippers.) The state appealed to the Supreme Court, which affirmed, stating that the district court had ruled against the state on the facts and that "[i]t is enough to say that we approve" of the district court's reasoning.[142]

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[139] Red 'C' Oil Mfg. Co. v. Board of Agric., 222 U.S. 380, 393-94 (1912).

[140] 277 F. 463 (S.D. Ohio 1921), *aff'd* 261 U.S. 449 (1923). A three-judge district court convened because the case involved the constitutionality of a state statute.

Finally, if an inspection fee is found to exceed the amount that is "absolutely necessary" to enforce the state's program, the excess might well be characterized as a forbidden impost or duty on imports or exports. So viewed, it seems to qualify for the federal-inurement feature of the Import-Export Clause. This means that the taxpayers who sought refunds in the cases summarized were the wrong claimants, since the amount should have been disgorged to the Treasury of the United States.

B. Congressional Consent

The Import-Export Clause begins with a blanket authorization to Congress to consent to an otherwise forbidden impost or duty on imports or exports, somewhat similar to the judge-made right of Congress to consent to an otherwise prohibited state violation of the dormant Commerce Clause. In exercising its Import-Export consent power, Congress can evidently pick and choose among the states and, within any particular state, among one impost or duty and another. To be sure, the Constitution provides that "all Duties, Imposts and Excises shall be uniform throughout the States,"[143] but this constraint applies only to federal exactions, and it seems unlikely that a state impost or duty would become a tax imposed and collected by Congress by virtue of a Congressional consent that brushes aside the prohibition imposed on state taxes by the Import-Export Clause. Moreover, the consent presumably negates application of the federal-inurement provision of the Import-Export Clause; otherwise, the consent procedure, as a practical matter, would become a dead letter.[144] In any event, doubts about this conclusion could be dispelled by including a release of any federal claim to the resulting state revenue in the consent itself.

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[141] *Phipps*, 277 F. at 468.

[142] *Phipps*, 261 U.S. at 452.

At the end of the Import-Export Clause, there is a puzzling second reference to the powers of Congress to "revis[e] and controul" "all such laws." If "all such laws" refers only to the state's inspection laws, the power seems never to have been exercised; if, on the other hand, the reference is to state taxing laws, the power seems to add nothing to the consent procedure set out at the beginning of the Clause.

VIII. CONCLUSION

Though the Import-Export Clause's framing and initial interpretation by the Supreme Court seemed to portend an important role for the future, the Clause has become handmaiden to the Commerce Clause—not the other way around, as early events may have suggested. Restricted to the field of foreign commerce in the late nineteenth century by the Supreme Court, the Court then further eased the Clause's limitations on states' taxing powers in the second half of the twentieth century. The 1976 *Michelin Tire* decision replaced the mechanistic original package doctrine, long criticized for its overly generous tax immunity for foreign commerce, with a more purposeful approach. While the Court's doctrinal replacement for the original package doctrine has been easier to articulate than to apply, there is no mistaking the general trend towards the allowance of state taxes that are not intended to discriminate against foreign commerce, that do not impose on foreign commerce more than its "fair share" of the state's tax burden, and that do not tax foreign commerce merely *because of* its origins.

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[143] U.S. CONST., art. I, § 8, cl. 1.

[144] The amount inuring to the federal government is the "net produce" of the imposts and duties, so that the state presumably can at least reimburse itself for its inspection costs and other expenses of collection.

Should Congress deem it necessary or expedient to allow states to impose the sorts of taxes otherwise forbidden by the Import-Export Clause, Congress has the power to remove the prohibition. In addition, states may impose, without congressional consent, imposts and duties "absolutely necessary" for the execution of their inspection laws, though they must hold the net proceeds from those impositions for the benefit of the United States Treasury. Moreover, according to the Clause, Congress seems to retain the right to revise and control any such inspection laws, though the scope and limitations of such power are undefined, largely because Congress has not exercised it.

ESTABLISHING A FEDERAL CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT IN US AND IN OUR POSTERITY

Bruce Ledewitz[*]

INTRODUCTION—THE PLIGHT WE ARE IN

What are the implications for American constitutionalism of the following episode?

I was at a dinner table some months ago, when the talk turned to global warming. One man said, "What do I care about global warming? By the time things get really bad, I'll be dead."[1]

Notice that the man in my story did not doubt the truth of global warming. He did not doubt that the climate is growing progressively hotter. He did not doubt that human activity is in large part responsible for this change. He did not doubt that the warming of the climate will bring disaster for the human community at some future time. The man simply did not wish to do anything about it. The man at the table in my story is a perfect representative of the current, dominant generation in the United States—the so-called baby boomers. Within this group, the idea of sacrifice for the sake of future generations has weakened.

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[1] No sooner did I write these words from an actual encounter than I ran across this criticism of environmentalism from Bruce Fein:

> Persons living on the abyss of privation also customarily crave greater economic activity and growth than martyrdom to forestall some fanciful possibility of global warming or the potential health hazards of ozone depletion at some distant time when they, their children, and grandchildren will all be dead.

Bruce Fein, *Environmental Imperialism*, WASH. TIMES, June 24, 1996, at A16.

There are today numerous threats to the Earth's environment—by which I mean its capacity to support human life.[2] Global warming is not the only such crisis, but in some ways it stands for all of them. Thus, in measuring the willingness of people to deal with the many threats, it is helpful to concentrate on global warming. The man at the table, after all, was not suggesting that we should first deal with ozone depletion or species eradication before worrying about the climate.

Conservative commentators have written and spoken against the culture of instant gratification for years.[3] But, for reasons I do not understand, they have not drawn this conclusion in regard to global warming in particular or environmental threats in general. It is as if there were a cultural divide between environmentalists and conservatives that prevents any shared perspectives. Yet, the context of the environment illustrates very well the selfishness and self-centeredness of which they speak.

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[2] The anthropocentric perspective is an ironic starting point for an article about a constitutional right to a healthy environment. It is the anthropocentric perspective that is, in large part, the source of our problems today. I adopt this perspective for two reasons. First, law is anthropocentric in tradition and content, perhaps inevitably so. I am attempting to show that within that perspective, environmental protection should be accorded constitutional status. Second, there really is no other perspective possible when discussing threats to the environment. Human activity, after all, is no threat to the earth in general, or even to life on earth in general. Even if we disrupt the capacity of the earth to support large animal populations, as we are slowly doing, there are other forms of life available to fill the niches left open. To put the matter starkly, the earth does not need our help. The earth does not face a crisis, humans do.

[3] *See, e.g.*, *Fox News* (Fox television broadcast, Dec. 1, 1996), *available in* 1996 WL 12124626.

> I think the culture is more of a problem. I think a constant barrage of messages to young people about instant gratification, about not thinking about consequences, about not thinking for the long run and about not thinking of themselves as what we say we are—moral and spiritual beings—has real—has a real cost.

Id.

It is this intergenerational callousness that prompts this article. Assuming that the various environmental threats are real, the current public policy responses appear tragically and irresponsibly weak. The rights of future generations are being sacrificed for the comfort and convenience of current voters. These rights, once lost, are not retrievable. Once the climate is altered, or the rain forests destroyed, or the tiger extinct, there is no going back. Choices made today bind the future.

It is the thesis of this article that American constitutionalism is capable of responding to our situation. The United States Constitution need not be interpreted to stand mute while the environment and the interests of the future are sacrificed. The interpretation that I propose does not require some sort of constitutional revolution, nor does it require a constitutional amendment. The elements of the needed response are already present in due process and equal protection doctrines. We need only apply them.

I am aware, of course, that there is controversy over the accuracy of dire descriptions of the environment. It is said, for example, that global warming may not be happening; the climate may not be warming, or if it is, humans may not be causing it. Or, if humans are causing it, the consequences may not prove catastrophic.[4] In this article, I will list some of the evidence that suggests that numerous environmental conditions today threaten human welfare. Nevertheless, I am not really attempting to convince people of this. I assume here, as did the man in my story, that global warming, along with numerous other environmental degradations, is happening. But I admit that it is only in light of these assumed threats that recognition of a constitutional right to a healthy environment would be justified.

Part I of this article outlines the background of a proposed constitutional right to a healthy environment. This includes what the current environmental facts seem to be, what role a constitutional environmental right might play, and what doctrinal sources exist that could be called upon to establish such a right. Part II describes the current thinking about the environment in terms of a constitutional, or otherwise fundamental, right. Part III deals with issues of constitutional interpretation and details current approaches to substantive due process and equal protection. Part IV applies these doctrines to the environment. Finally, Part V takes up some particular objections to the recognition of a constitutional right to a healthy environment, including new anti-environmental thinking in American law.

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[4] *See infra* notes 37-47 and accompanying text (discussing competing opinions on global warming).

Does the United States Constitution have anything to teach about the environmental dangers we are facing and what we must do about them? As the Constitution is today understood by what might be called the legal mainstream, the answer is no.[5]

The purpose of this article is to begin to change the legal mainstream. The need for, and the appropriateness of, change can be seen by contrasting the responsibility of one generation to the next as exhibited by the man in my story compared to that exhibited by an actual framer of the Constitution, John Adams:

> I must study Polilticks and War that my sons may have liberty to study Mathematicks and Philosophy, Geography, Natural History, Naval Architecture, Navigation, Commerce and Agriculture, in order to give their Children a right to study Painting, Poetry, Musick, Architecture, Statuary, Tapestry and Porcelaine.[6]

This quote reminds us that the current intergenerational irresponsibility is not inevitable or natural. It is simply our generation's way, and it is subject to correction.

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[5] *See, e.g.,* Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present,* IX FORDHAM ENVTL. L.J. 107, 128 (1997) (stating that Congress has addressed environmental problems rather than change constitutional doctrine in order to recognize environmental rights and issues).

[6] *Quoted in* RICHARD RULAND & MALCOLM BRADBURY, FROM PURITANISM TO POSTMODERNISM: A HISTORY OF AMERICAN LITERATURE 34 (1991).

I end this introduction with a note of realism about the law. The suggestion in this article that a constitutional right to a healthy environment be recognized unquestionably represents an expansion of both substantive due process and equal protection. Given the general political and jurisprudential climate, any such appeal appears quixotic.

I do not expect recognition of an environmental right in the immediate political/jurisprudential context. Nevertheless, I make the appeal for two reasons. First, as will appear below, substantive due process may have been strengthened recently by the Court, and the equal protection approach I outline has not been that controversial. Thus, my proposal seems possible. Second, with regard to the environment, the current political context is not going to remain stable.

Today, the public is quiescent about the various threats to human welfare associated with environmental degradation. This cannot continue to be the case, however. Within the next few years, global warming and other related environmental issues are either going to cause great human suffering or they are not. Either environmentalists have been recklessly misstating the evidence, or corporate interests and their political allies have been deluding the public. If the former turns out to be the case, environmentalism as a whole will be weakened and discredited. On the other hand, if the environmental crises worsen substantially, the public will demand radical action from the government. In that new political context, a constitutional right to a healthy environment will no longer seem far-fetched.

PART I—BACKGROUND TO A CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT

A. The Threat to Our Environment

"[T]he consensus on climate change has at last reached critical mass. That some climate change is occurring is almost universally believed."[7]

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[7] Jay Michaelson, *Geoengineering: A Climate Change Manhattan Project*, 17

"Ten years ago . . . global warming was only a hypothesis. . . . [I]t has become a fact."[8]

For the moment, let global warming, as the most serious and best-known environmental threat, stand for the rest. The first question is, is it getting warmer? On the door of my office, I keep some of the global warming stories that catch my eye. Here are some headlines from this year that appeared in the *Pittsburgh Post-Gazette*, my hometown paper:

> "'THE YEAR THE WORLD CAUGHT FIRE'—'97 Was the Worst Year in Recorded History for Tropical Forests'"[9]
>
> "'97 GLOBAL WARMTH HIGHEST OF CENTURY—The Figures Strengthen Most Scientists' Belief that Global Warming Is Real and Not a Product of Natural Variations in the Climate'"[10]
>
> "Antarctic Warming—British scientists warned that the massive Larsen B ice sheet is breaking up in Antarctica because of rapid rises in temperature associated with global warming."[11]
>
> "Warming Suspected as Ice Shelf Breaks Off"[12]

I kept the "Antarctic Warming" story above because of the

STAN. ENVTL. L.J. 73, 74 n.1 (1998) (referring to Kyoto Conference).

[8] Bill McKibben, *A Special Moment in History*, ATLANTIC MONTHLY, May 1998, at 5, 55, 65.

[9] Sue Leeman, *The Year the World Caught Fire*, PITT. POST-GAZETTE, Dec. 17, 1997, at A3 ("More tropical forests burned in 1997 than at any time in recorded history. . . ."). The article attributed the effect to the El Nino phenomenon. *Id.*

[10] Robert S. Boyd, *'97 Global Warmth Highest of Century*, PITT. POST-GAZETTE, Jan. 9, 1998, at A3 (noting that nine of past eleven years had been some of hottest recorded).

[11] *Antarctic Warming*, PITT. POST-GAZETTE, Feb. 6, 1996, at A14 (warning that rising Antarctic temperature could cause ice shelves to break off).

[12] Curt Suplee, *Warming Suspected as Ice Shelf Breaks Off*, PITT. POST-GAZETTE, Apr. 20, 1998, at A18. A piece of the Larsen B ice sheet the size of the District of Columbia broke off. *Id.*

remarkable perspicacity the "British scientists" in the above headline were subsequently shown to have had.

None of these stories proves anything. One warm year, even one as warm as 1997, could simply be a normal variation. But the trends are ominous. Global temperatures since 1900 have increased by about one degree Fahrenheit.[13] During the last ice age, temperatures were lower than previously by only five to nine degrees.[14] Therefore, small changes in temperature can have big impacts.[15] Scientists have predicted further increases in temperature of two to six degrees during the twenty-first century unless dramatic remedial action is taken.[16]

Actually, there is a lot of evidence that global warming is already occurring. As Charles H. Southwick points out, "[t]here is no doubt that global temperatures have been increasing for the last 200 years, and that this warming trend has accelerated in the last 2 decades."[17] During this same time period, most of the world's glaciers have retreated.[18] Indeed, the breaking off of a piece from the Larsen shelf was just the latest such break.[19]

The American public probably first noticed the global warming phenomenon in 1988 as a result of unusually hot and dry weather that led to huge forest fires and crop failure. James Hansen, director of NASA's Goddard Institute for Space Studies, when appearing before Senate committee hearings, attributed the weather to global warming.[20] Since that time there have been a series of hottest years on record.[21]

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[13] Boyd, *supra* note 10, at A3.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] CHARLES H. SOUTHWICK, GLOBAL ECOLOGY IN HUMAN PERSPECTIVE 213 (1996).

[18] *Id.* at 216-17.

[19] *See* ROSS GELSPAN, THE HEAT IS ON 1 (1997). There is speculation that the warming is uneven, thus accounting for more dramatic effects in the Antarctic. *Id.* at 2 (stating that in some places in Antarctica, average temperatures appear to have risen almost twenty degrees in twenty years).

[20] *See* MARVIN S. SOROOS, THE ENDANGERED ATMOSPHERE 186-87 (1997).

If global warming is occurring, are humans causing it? The single most prestigious source to say so has been the Intergovernmental Panel on Climate Change (IPCC), a United Nations-sponsored body of climate experts, which concluded in December 1995 that human emissions of "radiatively active gases" will contribute to global warming.[22] The IPCC's statement is probably the most reliable evaluation of all the scientific data: "The balance of evidence suggests a discernible human influence on global climate."[23]

The IPCC's reference to "radiatively active gases" was a description of the "greenhouse effect," the term coined by Jean Baptiste Fourier in 1827 to describe the effect of certain gases in the atmosphere, particularly carbon dioxide,[24] which allows sunlight through to warm the earth, but which then tends to trap the resulting heat, preventing full radiation back into space.[25] The greenhouse effect itself is not subject to much scientific dispute.[26] Nor is there any question that humans are venting large quantities of greenhouse gases into the atmosphere.[27] It remains difficult to say with certainty that the increase in global temperature is being caused by these gases rather than by some other, unknown cause[28] or simply a long-term natural fluctuation.[29] Nevertheless, because of the overall consistency between actual atmospheric patterns and predicted or expected results from greenhouse gas models, any other explanation requires an "improbable coincidence."[30]

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[21] *See, e.g.,* Bruce Ledewitz & Robert D. Taylor, *Law and the Coming Environmental Catastrophe,* 21 WM. & MARY ENVTL. L. & POL'Y REV. 599, 603 (1997) (noting that 1995 was hottest year in recorded history). The ten warmest years on record have occurred during the 1980's and the 1990's. Mike Toner, *Temperature Records are Blamed on Global Warming,* ATLANTA CONST., Jan. 9, 1998, at A6. The trend was not uniform, of course. During that period the eruption of Mount Pinatubo in the Philippines in 1991 probably contributed to cooler temperatures in 1992 and 1993, but that turned out to be a temporary fluctuation. STEPHEN H. SCHNEIDER, LABORATORY EARTH 64 (1997).

[22] REPORT BY THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, U.N. GAOR, 11th Sess., Agenda Item 7(b) at 4, para 42, 42 U.N. Doc. A/AC.237183 (1995). "[E]missions of certain radiatively active gases that result from human activities are substantially increasing the atmospheric concentrations of these gases and that these increases will cause additional warming of the earth's surface." *Id. See also* McKibben, *supra* note 8, at 68.

[23] CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP I TO THE SECOND ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 4 (J.T. Houghton et al. eds., 1996)

[24] Other gases associated with the greenhouse effect are: "methane, nitrous oxide and various synthetics, notably the chlorofluorocarbons (compounds of carbon, chlorine, and fluorine)." J. GLYN HENRY & GARY W. HEINKE, ENVIRONMENTAL SCIENCE AND ENGINEERING 115 (2d ed. 1996). Though these other gases are present in only minute quantities, their warming effect rivals that of CO_2 and may lead to double the warming effect expected for CO_2 alone. *Id.*

[25] *See* PAUL BROWN, GLOBAL WARMING 12 (1996).

The question facing humanity is, what is the effect of global warming likely to be? The answer to that question depends upon whether levels of greenhouse gases in the atmosphere continue to increase. To a certain extent, therefore, the answer depends on what humanity does in response to the threat.

At the Kyoto Conference, the recent Third Conference of the Parties to the United Nations Framework Convention on Climate Change, more than 160 nations assembled to sign a protocol to the 1992 Framework Convention on Climate Change.[31] Under the agreement, the United States agreed to reduce greenhouse gas emissions by seven percent below 1990 levels by 2012, the European Union by eight percent, and Japan by six percent.[32] But even if all the Kyoto targets are met, it is estimated that the level of atmospheric CO_2 will still climb to 382 ppmv (parts per million by volume) by 2010[33] and will reach double the pre-industrial level by the year 2100, to about 550 ppmv.[34]

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[26] *See* Stephen H. Schneider, *The Greenhouse Effect: Science and Policy*, 243 SCI. 771 (1989) (calling greenhouse effect "one of the most well-established theories in atmospheric science").

[27] "The atmospheric CO_2 content is usually measured in terms of its concentration relative to all other gases in parts per million by volume (ppmv)." HENRY & HEINKE, *supra* note 24, at 113. The pre-industrial level of carbon dioxide in the atmosphere is estimated at 280 ppmv. *Id. See* Michaelson, *supra* note 7, at 81 n.31. The level today is about 360 ppmv. *Id. See* McKibben, *supra* note 8, at 64. Fifty years from now, the level is likely to be around 500 ppmv. *Id.* at 65. "Undoubtedly, the added CO_2 in the atmosphere is coming from the burning of fossil fuels, the cutting of forests, and the wastage of soil humus . . . ." HENRY & HEINKE, *supra* note 24.

[28] There have even been suggestions that sunspots are causing global warming. *See* William J. Broad, *Another Possible Climate Culprit: The Sun*, N.Y. TIMES, Sept. 23, 1997, at F1 (stating that sunspots may be responsible for climate change).

[29] *See, e.g.*, Richard A. Kerr, *It's Official: First Glimmer of Greenhouse Warming Seen*, 270 SCI. 1565, 1566 (1995) (noting that scientists are not certain that climate change is not just natural fluctuation).

[30] SCHNEIDER, *supra* note 21, at 88.

[31] *See* Christopher Flavin & Seth Dunn, *Responding to the Threat of Climate Change*, *in* STATE OF THE WORLD 1998, 113 (Worldwatch Institute 1998) (describ-

Aside from the inherent weakness of the Kyoto Accord, there is no reason to think that the Accord will actually be ratified by the United States Senate. Shortly after the Accord was signed, it was deemed unlikely to be approved, even by its supporters.[35] Treaty opponents have been more vocal, of course, calling the Kyoto Accord a "dead duck" that has no realistic chance of passing the Senate.[36] At the time of this writing, the Clinton Administration had still not announced a certain date to submit the Accord for Senate action.

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ing environmental changes that led to Kyoto Conference).

[32] *See* Peter Baker & Helen Dewar, *Long Road Ahead for Global Warming Pact,* WASH. POST, Dec. 12, 1997, at A1 (noting that Kyoto Accord would commit world's industrialized nations to first binding limits on greenhouse gases).

[33] *See* Joby Warrick, *Reassessing Kyoto Agreement, Scientists See Little Environmental Advantage*, WASH. POST, Feb. 13, 1998, at A14 (noting that Kyoto Conference did not achieve limitation on buildup of greenhouse gases in atmosphere). A major factor in this pessimistic assessment, aside from the limited nature of the goals adopted at Kyoto, is that the agreement only involves thirty-eight industrialized nations. Cameron Barrand & Lawrence J. Goodrich, *The Future of Kyoto Climate Accord is Still Up in the Air,* CHRISTIAN SCIENCE MONITOR, Dec. 12, 1997, at 8 (stating that omission of provision allowing developing nations to undertake binding commitments will complicate process of ratifying agreement in Senate). Developing nations like India and China, which already contribute to greenhouse emissions and whose emissions will greatly increase in the future, are merely urged to set voluntary reduction targets. *Id.* This is not a reason for the industrialized nations to refuse to sign, because they have done the most damage, after all.

[34] *See* William K. Stevens, *Despite Pact, Gases Will Keep Rising*, N.Y. TIMES, Dec. 12, 1997, at A16 (stating that even if participants obeyed emission levels, atmospheric levels of gases would still rise).

[35] *See* Baker & Dewar, *supra* note 32, at A1 (noting that Clinton has had difficulties pushing treaties through Senate).

[36] *See, e.g.*, Hugo Gordon, *International: Global Pollution Treaty Declared a Dead Duck*, DAILY TELEGRAPH (London), Dec. 12, 1997, at 18 (noting that Republicans and Democrats cannot recall more unattractive agreement).

It is obvious why the Accord has so little prospect of success. First of all, people are not so naive as to believe assurances that serious cutbacks in greenhouse gas emissions could be achieved painlessly. While the cutbacks required by the Kyoto Accord do not sound drastic, they are substantial compared to the projected *increase* of greenhouse gas emissions of thirty percent that has been predicted for the United States economy by the year 2010.[37] When Republican opponents of the Accord say that its implementation would cost jobs,[38] they are somewhat correct. What the critics do not point out is that inaction will also cost jobs. In fact, it will result in the loss of more than just jobs.

Another reason that the Accord is in political trouble is because the costs of doing something about the problem of global warming must be paid now, while the benefits will occur much later, when, as the man in my episode said, many of us will be dead. Jay Michaelson calls global warming an "absent problem," largely for this reason.[39]

The fact that global warming is not absolutely manifest today does more than just encourage the selfishness that says, "I will not sacrifice present advantage for future benefit." In addition, it encourages an attitude of wishful thinking. Searches of global warming stories in the news on both Westlaw and Nexis pull up many more articles which are skeptical of all aspects of the global warming phenomenon than articles accepting the phenomenon as true.[40]

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[37] *See* Baker & Dewar, *supra* note 32, at A1.

[38] *See* Laurie Kellman, *GOP says Global Warming Treaty Would Mean Loss of Jobs*, BUFF. NEWS, Dec. 12, 1997, at A3 (reporting that Republican members of Congress were concerned that Treaty placed too few controls on developing nations' polluting).

[39] Michaelson, *supra* note 7, at 84-87.

[40] A vigorous example is Marilyn K. Vehring's letter to the *Milwaukee Journal Sentinel* on January 17, 1998, which started out: "It's time to set the record straight on global warming and the Kyoto treaty: Global warming is the greatest hoax ever perpetrated on the people of the world." Marilyn K. Vehring, *Global Warming Treaty Aimed at U.S. Economy*, MILWAUKEE J. SENTINEL, Jan. 17, 1998, at 2. I estimate that the number of skeptical stories outnumber the stories accepting the theory of global warming by a ratio of two to one.

This wishful thinking is not entirely self-induced. Industry, particularly the fossil fuel industry, is taking careful aim at the Kyoto Accord, attempting in particular to cast doubt on the science behind global warming forecasts.[41] Paul and Anne Ehrlich call such campaigns "brownlash" and suggest that organized misinformation campaigns are becoming common.[42]

I realize that by calling public reaction "wishful thinking," I am assuming that the global warming skeptics are fundamentally and grossly wrong, when in fact I cannot be certain. It is true that I am, like most lawyers, scientifically illiterate. Global warming and related environmental threats demonstrate that law schools must ensure that their graduates can evaluate the sorts of scientific arguments that will ground public policy in the twenty-first century.

However, whatever our level of scientific knowledge, law cannot escape nature. Global warming is either happening and being caused by humans, or it is not. It is ultimately not a matter of opinion. For myself, I admit that I do not really know whether the antarctic ice sheets are breaking up because of global warming or because, as one skeptic said, of volcanic activity under the ice. However, anyone can see the permafrost in retreat all over the world.[43] I moved to Pittsburgh, Pennsylvania with my family in 1979. Since that time, I do not believe there has been even one year with "average" temperatures, historically speaking. Last year, 1997-1998, winter never really came at all. These things frighten me and cause me great concern for the future of my children and grandchildren.

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[41] *A Misinformation Campaign*, ST. LOUIS POST-DISPATCH, Apr. 28, 1998, at B6. In April, the National Environmental Trust released an eight page memo purporting to outline an industry plan, hatched in the offices of the American Petroleum Institute, to spend five million dollars over the next two years challenging global warming predictions by, among other things, recruiting scientists and training them in public relations. *Id.*

[42] ANNE H. EHRLICH & PAUL R. EHRLICH, BETRAYAL OF SCIENCE AND REASON 217-31 (1996).

[43] *See* Steve Newman, *Earthweek: Diary of the Planet for the Week Ending 14 June 1996*, TORONTO STAR, Jun. 18, 1996, at C6 (documenting retreat of Canadian permafrost in Mackenzie Basin by up to two hundred kilometers during past one hundred years).

Another factor that has led to public disinterest in global warming has been the hostile attitude of conservative religious leaders. For example, Reverend Jerry Falwell minimizes the dangers of environmental threats, like global warming, in preference to what he considers the real problems of America: "divorce, drugs, AIDS, violence, abortion, illegitimate births and acceptance of homosexuality."[44] This attitude is unfathomable. Man's hubris in threatening God's creation would seem to be just the issue that would attract Falwell. Furthermore, even if one accepts Falwell's entire list of problems, none of them is in competition with global warming. Climate degradation can only exacerbate the problems that concern Falwell.

Finally, in regard to global warming, it is necessary to evaluate how bad effects are likely to be and whether costly attempted solutions are justifiable.

There are suggestions that the effects of global warming will be serious "unless something is done to stop [the buildup in atmospheric greenhouse gases], experts predict a further rise of two to six degrees by the year 2100, causing major heat waves, droughts, floods and other catastrophes."[45] The potential damage to the world as a whole from global warming has been estimated to be around $5.6 trillion.[46] In addition, there are possible but, as far as we know, unlikely costs, such as fresh water from melting ice flooding into the oceans and disrupting the Gulf Stream, upon which the habitability of Europe largely depends.

On the other hand, there are those who say that the overall effect of warming will actually be positive in the long run.[47] For example, it is likely that higher levels of CO_2 will increase crop yields in mid-northern latitudes.[48] However, these isolated potential advantages are overwhelmed both by massive negative effects and the certain unwillingness of the climate winners, if there are any, to compensate the losers. These optimistic predictions can be attributed to "ignorance of basic ecology."[49]

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[44] Gayle White, *Falwell Stars, Shows Stripes at Tucker Rally*, ATLANTA CONST., Mar. 24, 1998, at 2B (reporting on rally where Falwell outlined America's problems).

[45] Leeman, *supra* note 9, at A3.

[46] WILLIAM D. NORDHAUS, MANAGING THE GLOBAL COMMONS 82-83 (1994).

[47] GELSPAN, *supra* note 19, at 33-61 (detailing claim that effect of global warming will be positive and other claims made by what Gelspan calls "climate skeptics").

Some suggest that even if global warming does occur to some extent, and even if it is harmful to some extent, the effects will be sufficiently gradual so that humans can simply adapt. Wilfred Beckerman comments that we will have time to put on lighter shirts.[50]

I suppose humans can adapt to anything, including a severely colder Europe, should that occur. Eventually, wheat producers in Canada and Russia can grow more wheat, if wheat can no longer be grown in the United States. Disneyworld in Orlando can enclose itself if a warmer climate increases the risk of encephalitis.[51] Schoolchildren in Texas can be made to stay inside for recess, if a drier climate leads to more forest fires in Mexico.[52] People are inventive and will create solutions no matter what the situation. However, even if such adaptations occur, the pain of adjustment will be staggering. It will be quite unlike putting on a new shirt.

Also, adaptation is not likely to ameliorate the major effects of global warming. The warming of the world's climate will not take the gentle form of a three degree rise in temperature every day, so that the twenty-seven degree day in January will then be thirty degrees and a warm spring afternoon will just be a little drowsier. Rather, there will be more heat waves like the one that killed more than 700 people in the Chicago area in the summer of 1995.[53] Additionally, there will be millions of refugees from rising sea levels, drought and resulting famine where people presently live without a peaceful way to move elsewhere, and more violent weather from the added energy in the atmosphere.[54] These are not conditions to which one can adapt, or rather, whatever adaptations take place will not noticeably lessen the harm.

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[48] *Id.* at 37.

[49] Michaelson, *supra* note 7, at 83 n.37.

[50] Wilfred Beckerman, *Why Worry About the Weather?*, WALL STREET J. EUR., Aug. 25, 1995, at 6. *See generally* EHRLICH & EHRLICH, *supra* note 42, at 134.

[51] During the summer of 1997, Florida health officials issued a medical alert in the Orlando area that caused Disneyworld to limit its hours temporarily. *See CNNFN* (CNNFN television broadcast, Aug. 29, 1997) (Nexis Transcript Number 97082922Fn-LO2).

[52] *See* Ron Hutchenson & Ricardo Sadoval, *Haze From Mexico Threatens the North, Texas Under Health Alert,* PITT. POST-GAZETTE, May 23, 1998, at A2.

I have devoted a great deal of attention to global warming, merely one major environmental threat facing humankind. There are other interrelated threats.

The first modern environmental crisis was the depletion of the stratospheric ozone layer by the use of chlorofluorocarbons (CFCs) leading to the exposure of human beings and other life forms to harmful levels of ultraviolet radiation.[55] In response to clear evidence in 1985 that the ozone layer was in fact thinning, the 1987 Montreal Protocol and its subsequent amendments were adopted, which have greatly reduced the production and use of CFCs and other chemicals believed to threaten the ozone layer.[56] While this effort may legitimately be considered an environmental success story, recent evidence seems to show that the lessened levels of ozone protection already caused by human activity may be contributing to a worldwide, dramatic decline in the population of amphibians.[57] Although ozone levels are now expected to begin a steady increase, it is not clear at what point the danger will have passed.

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[53] *See* Nancy Ryan, *A Deadly Summer, Winter Warning*, CHI. TRIB., Nov. 17, 1995, at 3 (describing how City of Chicago develops extreme weather policies).

[54] The death toll from tornados in the United States was 121 for the first half of 1998, and deaths for the year as a whole are likely to be the highest since 1974. Mary Puente & Shannon Tangonan, *1998' Twister Death Toll Already 121*, USA TODAY, June 1, 1998, at A1.

I am not suggesting that these tornados resulted from global warming. I am not even suggesting that they stemmed from the El Nino phenomenon, which itself may be influenced by global warming. I am saying that more energy in the atmosphere which leads to more violent weather will lead to great human suffering.

As this article was being prepared, Florida was suffering from weeks of wildfires which finally seem to be ending. Like tornados, the Florida fires may or may not be "caused" by global warming. I refer to them not as proof of global warming's effects, but as a reminder of the power of the forces humankind is disturbing. *See* Michael D. Sallah, *Weather Aids Fight on Fires Higher Humidity Shows Blazes, Many Go Home*, PITT. POST-GAZETTE, July 5, 1998, at A1.

In addition, there has been a great deal written regarding the likely affects of global warming in general. For these likely effects of global warming in general, see BROWN, *supra* note 25, at 93-133; GELSPAN, *supra* note 19, at 135-51; McKibben, *supra* note 8, at 70-72.

[55] *See generally* SOUTHWICK, *supra* note 17, at 215-16.

Compared to the depletion of the ozone layer, international cooperation has failed to deal with other environmental threats. For example, the chronic lack of adequate supplies of drinkable water has been called the "world's most truly murderous environmental problem."[58] It is estimated that twenty percent of the world's human population lacks access to clean water.[59] Also, deforestation has already led to the disappearance of half the world's forests, and the trend is accelerating.[60] Land degradation from a variety of human causes led to a nineteen percent decline in the amount of arable land per person in the world in the 1980s.[61] Desertification claims an additional six million acres per year[62] and poses a more immediate threat to human welfare than long term global warming.[63] Increases in food production, both land based and from world fisheries, are slowing or have stopped.[64] Widespread famine is now a possibility. Most surprisingly, the oceans themselves, surely an inexhaustible resource, are showing signs of degradation because of the activities of humankind.[65]

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[56] SOROOS, *supra* note 20, at 147-48.

[57] *See* Paul Recer, *New Light On Ultraviolet Danger*, BERGEN RECORD, Dec. 9, 1997.

[58] CHRISTOPHER D. STONE, THE GNAT IS OLDER THAN MAN, xviii (1993).

[59] McKibben, *supra* note 8, at 60.

[60] Janet N. Abromovitz, *Sustaining the World's Forests, in* STATE OF THE WORLD 1998, at 21.

[61] SOUTHWICK, *supra* note 17, at 100. Arable land availability is continuing to decline. *See FAO: Warning over World Hunger and Desertification*, 1997 EUROPE INFORMATION SERVICE AGRI-INDUSTRY EUROPE, Oct. 10, 1997.

[62] Barney, Pickering & Speth, *The Global 2000 Report to the President, Washington DC* (U.S. Government Printing Office 1982).

[63] STONE, *supra* note 58, at xviii-xix.

[64] Brown, *The Future of Growth, in* STATE OF THE WORLD 1998, at 5, 16.

[65] *See* Alex Barnum, *Sounding A Siren for the Sea*, S.F. CHRON., June 8,

Perhaps the most significant environmental crisis is the least visible: the long-term loss of biodiversity in the world.[66] Although estimates of biodiversity are notoriously vague, scientists have likened the destruction of species occurring today to mass extinctions in earth's history during the Ordovician, Devonian, Permian, Triassic and Cretaceous periods.[67] Unlike other environmental threats, we don't really know what the loss of biodiversity portends. In regard to the pharmaceutical industry alone, we may be destroying the hope of finding a cure for cancer, for example.[68] We have a sense of what the loss of the tiger might mean, or the swordfish, but we lack a sense of the loss of a portion of the whole biosphere.

All of these environmental threats are exacerbated by the growth of human population. The current world population is about 5.9 billion. The good news is it appears that world population growth is sharply declining.[69] Instead of reaching eleven billion people before stabilizing, as previously predicted,[70] it now seems possible that the stabilization point might be as low as eight billion people.[71] Of course, the bad news is that a population of eight billion, which is still the most optimistic forecast, is two billion more people than the planet sustains now.

The importance of population growth is that the current environmental problems do not stem from a particular act of pollution, a particular toxic chemical, or even a particular set of products that can be banned. As one commentator observed, "[n]ew kinds of pollution come . . . from things going as they're supposed to go—but at such a high volume that they over-

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1998, at A1 (stating that first National Ocean Conference to assess myriad of environmental threats to seas).

[66] SOUTHWICK, *supra* note 17, at 255.

[67] *Id.*

[68] *Id.* at 258-59.

[69] David Briscoe, *EarthWatch '97: Surprisingly Hopeful*, DETROIT NEWS, June 1, 1997, at A2.

[70] *See* John Bongaarts, Letter, N.Y. TIMES, Nov. 3, 1997, at 14 (discussing dangers of overpopulation).

[71] Robin Chandler Duke & Shanti Connly, Letter, N.Y. TIMES, Dec. 14, 1997, at 20.

whelm the planet. They come from normal human life—but there are so many of us living those normal lives that something abnormal is happening."[72]

The most common greenhouse gas, for example, CO_2, is not "pollution" at all. Chlorophyll in plants breaks down CO_2 to form organic molecules; animals obtain the carbon they need by eating plants or by eating other animals that eat the plants. Carbon in vegetation is released to the atmosphere through respiration and burning. Thus, our air can both be cleaner and contain greater concentrations of CO_2. Nor is there any obvious way of using fossil fuel—the source of which is vegetation—without producing higher levels of CO_2.

For these reasons, doing something about the plight we are in is going to be inconvenient, expensive, and complicated. This explains, in part, our reluctance to take drastic action.

The call for constitutional recognition of a right to a healthy environment in us and our posterity is premised on the seriousness of our situation and the reluctance we are showing to take effective action. In the next section, I will briefly outline the nature of the right and some of the issues it raises. I must add here, however, that ultimately this constitutional right is premised on a question of fact. If my description of the interrelated problems set forth above turns out to have been overstated, no action will need to be taken. Eventually, courts will hear these issues. When they do, they will be free to address them as courts do many issues of fact: as a matter of reasoned judgment. Perhaps the greatest single contribution the courts can make in the environmental area is simply to enter it and to conclude whether and to what extent human welfare is threatened by environmental conditions today.

B. The Nature of the Constitutional Right to a Healthy Environment

Before the right to a healthy environment can be evaluated it must be explained. What is meant by a constitutional right to a healthy environment? The phrase "healthy environment" may seem vague. I use it because it is a broad and, as these things go, a common term both in speculative[73] and authoritative[74] legal texts.[75]

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[72] McKibben, *supra* note 8, at 64.

By "healthy," though, I do not mean simply to incorporate any of these other definitions. What people have a right to now, and what future generations have a right to, is more than just a certain quality of clean air and pure water, though it is surely a part of having a healthy environment. The right to a healthy environment is more than a functioning biosphere not degraded in its systems by people. The right that we have is to a planet that has not been unalterably changed by man, and that right is grossly threatened today.

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[73] *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632 n.5 (1986) (discussing sources supporting constitutional right to healthy environment); Brennan Van Dyke, *Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime*, 13 VA. ENVTL. L.J. 323, 324 (1994) ("[T]his Article will demonstrate that traditional notions of humans rights embrace a right to a healthy environment and that such a right is justiciable."); *see also* William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUMB. J. TRANSNAT'L L. 337, 399 (1995) ("In North America and worldwide, there is interest in creating or finding fundamental constitutional rights to a healthy environment, although such constitutional rights arguments have several weaknesses.").

[74] *See, e.g.*, David W. Opderbeck, Note, *Blowin' In the Wind: A Federal Answer to Environmental Tobacco Smoke*, 15 SETON HALL LEGIS. J. 213, 220 (1991) (discussing case law in smoking context); Victoria L. Wendling, Note, *Smoking and Parenting: Can They Be Adjudged Mutually Exclusive Activities?*, 42 CASE W. RES. L. REV. 1025, 1034 (1992) (same); *see also* Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 COLUMB. J. TRANSNAT'L L. 259, 281 (1995) (discussing Article 32 of Italian Constitution).

[75] Alternative formulations would do as well. For example, the term "healthful environment" is sometimes used. *See* Article XI, section 9 of the Hawaii constitution ("Each person has a right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.").

Sometimes a distinction between "healthy" and "healthful" is made. *See* Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J., 338, 345 (1996) (discussing equal protection in environmental rights context).

This right was first raised in the modern context of global warming in Bill McKibben's book, *The End of Nature*.[76] McKibben now calls that book "an early attempt to show that human beings now dominate the earth."[77]

> It's not that we've never altered our surroundings before. Like beavers at work in my back yard, we have rearranged things wherever we've lived. We've leveled the spots where we built our homes, cleared forests for our fields, often fouled nearby waters with our waste. That's just life. But this is different. In the past ten or twenty or thirty years our impact has grown so much that we're changing even those places we don't inhabit—changing the way the weather works, changing the plants and animals that live at the poles or deep in the jungle. This is total. Of all the remarkable and unexpected things we've ever done as a species this may be the biggest. Our new storms and new oceans and new glaciers and new spring times–these are the eighth and ninth and tenth and eleventh wonders of the modern world, and we have lots more where those came from.[78]

Although McKibben's ideas are recent, his philosophy is very old. Chief Seattle wrote to President Franklin Pierce in 1855, "This we know: the earth does not belong to man: man belongs to the earth . . . ."[79] The difference between Chief Seattle and McKibben is that humans seem to have the power now to act as if the world does belong to us. Chief Seattle might well tell us that our power is an illusion. The earth eventually will remind us at a terrible cost that it is not dominated by man.

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[76] BILL MCKIBBEN, THE END OF NATURE, 47-48 (1989).

> The temperature and rainfall are no longer to be entirely the work of some separate, uncivilizable force, but instead in part a product of our habits, our economies, our ways of life. . . .
>
> An idea, a relationship, can go extinct, just like an animal or a plant. The idea in this case is "nature," the separate and wild province, the world apart from man to which he adapted, under whose rules he was born and died. In the past, we spoiled and polluted parts of that nature. . . . We never thought that we had wrecked nature.

Id.

[77] McKibben, *supra* note 8, at 65.

[78] *Id.* at 71-72.

[79] Letter from Chief Seattle to President Franklin Pierce, *reprinted in* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 1 (1989).

This article is about the right to an environment that is predominantly "natural" rather than a manufactured event and about the role American constitutional law might play in the attainment of such a right.[80] Obviously, my proposal would not be currently accepted. I will deal with objections in due course—and the reader should remember that this work is intended to open a discussion in law that has not yet begun. Nevertheless, even at this preliminary point, one fundamental objection must be addressed: Is it not already too late for this right to be attained?

This is the argument that Jay Michaelson makes in his thoughtful and, it seems to me, dangerous article proposing "geoengineering" as a way of dealing with—even preventing—global warming.[81] Michaelson proposes that we recognize the danger of global warming and take immediate direct action to forestall it by intentionally cooling the earth's climate—by "sowing iron filings in the ocean to stimulate the growth of carbon-consuming phytoplankton" and/or the "controlled emission of dust particles to reflect solar radiation and incrementally cool the earth."[82]

Michaelson recognizes the hubris[83] in this proposal, and he is really only suggesting that we look at the possibilities (though he himself seems convinced).[84] But he makes the point that we are already changing the climate: "[T]he only remaining question is whether to continue to do so negligently, or to begin to tinker benevolently."[85] Why talk about a right to a natural earth when such an earth cannot exist, at least for a long time, if ever again?

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[80] A better title for this article would have been, Establishing a Federal Constitutional Right to "Nature" In Us and In Our Posterity, but that would have presupposed too much familiarity with environmental writing on the part of readers.

[81] Michaelson, *supra* note 7, at 75-76.

[82] *Id.* at 77-78.

[83] *Id.* at 124. At least I think he does. On the other hand, calling geoengineering a "manhattan project" begs the question of the consequences of the first manhattan project. Recently, India and Pakistan conducted nuclear tests. The resulting fears of an atomic arms race in Asia remind us that it is still quite possible that nuclear weapons will destroy human civilization. Robert Oppenheimer is reputed to have quoted from Bhagavad-Gita at the first atom bomb test: "Now, I am become death, the destroyer of worlds." *The Macmillan Dictionary of Political Quotations* 459 (Lewis D. Eigen & Jonathan P. Siegel eds. 1993).

It is precisely because we have forgotten our obligations to ourselves and to the future that recognition of the right to a healthy environment is crucial. It has begun to seem obvious to us that the earth is our resource to make use of as we choose. We can now actually imagine controlling the whole earth and everything in it.

It is true that our current plight may necessitate a radical, even damaging, next step. Perhaps we will even decide that it is necessary to cool the climate in order to stave off disaster. This is not an argument against the right to a healthy environment. Any right may be sacrificed in certain situations. It is better to recognize how far removed we are from our goal than to continue on in ignorance. Without recognition of the right to a healthy environment our policies may never begin to pull back from the situation we are in now.

There is nothing revolutionary about interpreting the Constitution to include the right to a healthy environment. The Constitution has been interpreted to provide for non-textual rights before. The right to a healthy environment is one of clear human welfare—not a right in nature itself.[86] As for justification of the right, perhaps the better question for a nation priding itself on limited government is, where did the right to permanently change the environment come from in the first place?

There are two beneficiaries of the right to a healthy environment. First, any individual affected by permanent, human-caused changes in the environment would be entitled to protection. That is the reference to "us" in the title of this article.

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[84] Michaelson, *supra* note 7, at 140 (stating in last line of article that "[w]e need a Manhattan Project").

[85] *Id.* at 128.

[86] Thus, the right to a healthy environment does not address Christopher Stone's famous question—should trees have standing? CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (William Kaufmann, Inc. 1974).

There is another beneficiary of the right—our posterity. Generations yet unborn ought to be able to rely on the right as well. I will consider this concept elsewhere in this article.[87] Here let me say only that the term "Posterity" is mentioned in the Preamble to the Constitution as a party to benefit from the Constitution.[88] In addition, it is not unusual to think of unborn generations as beneficiaries of environmental policy—the Pennsylvania Constitution, for example, names "generations yet to come" as a sort of current owner of Pennsylvania's "public natural resources."[89]

That does not mean, necessarily, that we will allow someone to sue on behalf of future generations. As a practical matter, the issue of intergenerational standing will not make much difference to enforcement of the right to a healthy environment. Even though environmental problems take years to manifest, smaller effects usually become evident sooner, as in the case of global warming. Therefore, a human being will normally be available to sue to enforce the right. Nevertheless, this article will press the right of future generations to a healthy environment because it is in regard to the future that our policies are most clearly heedless. The future needs protection now that courts are well situated to give.

The right to a healthy environment raises other questions about the role of the Constitution. The threat of harm to our environment emerges not so much from government as from the ordinary actions of masses of people; yet we think of the Constitution as involving what governments do. The right requires energetic government action, though not necessarily regulatory in nature; yet we think of the Constitution as a restraint on government. The right will require flexibility; yet we think of the Constitution as rigid.

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[87] *See infra* Part IV B.

[88] U.S. CONST. preamble. "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." *Id.*

[89] PA. CONST., art. 1, § 27.

These important considerations may limit the efficacy and even the desirability of recognition of the right to a healthy environment. But we must also remember that lawyers are in part to blame for our current situation. Law, including constitutional law, has played a large part in the creation of the culture of rights[90] that now threatens to mislead us. When the president of a forest products company wants to criticize environmentalism, he does not just say that his company will lose profits and that workers and consumers will be hurt. He says environmentalism threatens our constitutional rights.[91] The recognition of a right to a healthy environment will at least allow amelioration of the thinking that there is a right of permanent exploitation of the planet.

C. *Introduction to the Law of Substantive Due Process and Equal Protection*

Substantive due process and equal protection are the doctrinal underpinnings to the right to a healthy environment. Substantive due process is the name of the area of American constitutional law generally associated with rights not expressly referred to in the text of the United States Constitution. As the name implies, substantive due process involves a broad interpretation of the phrase "due process" in the Fifth and Fourteenth Amendments to the Constitution. Although highly controversial, a number of very important cases, most notably *Roe v. Wade*,[92] have been decided under this rubric.[93]

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[90] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 303, 445 (1993).

[91] Gerald M. Freeman, *Corporate Executive Says Radical Environmentalists Threaten Americans' Constitutional Rights* (P.R. Newswire, July 30, 1996).

[92] 410 U.S. 113 (1973) (recognizing woman's constitutional right to end pregnancy in its early stages).

[93] Chief Justice Rehnquist's majority opinion in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), used the term substantive due process in an apparent description of the reasoning in a number of cases. *See* Planned Parenthood v.

Roe sparked a debate in American law over methods of constitutional interpretation—as well as over abortion itself. John Hart Ely's description of the methodological debate, while perhaps tendentious, will nevertheless do for my purposes. Ely says the dispute is between "interpretivism," which holds that "judges . . . should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," and "noninterpretivism," which holds that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."[94] Substantive due process is associated with noninterpretivism.

As Ely himself points out, the distinction between interpretivism and noninterpretivism is not as clear as the language suggests, because the Constitution contains open-ended provisions, such as the Privileges and Immunities Clause of the Fourteenth Amendment[95] and the Ninth Amendment,[96] that appear to invite a general oversight of the substantive decisions of the political branches of government.[97] When someone "interprets" such terms—and the same might be said for the term "liberty" in the Due Process Clauses—one can go pretty far, while still opposing "noninterpretivism."

Casey, 505 U.S. 833 (1992) (recognizing right "to abortion"); Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognizing right "to use contraception"); Loving v. Virginia, 388 U.S. 1 (1967) (recognizing "right to marry"); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing right "to marital privacy" and "to use contraception"); Rochin v. California, 342 U.S. 165 (1952) (recognizing right "to bodily integrity"); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (recognizing right "to have children"); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (same); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing right "to direct the education and upbringing of one's children"). The opinion also relied on *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), where it suggested "that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720 (citing *Cruzan*, 497 U.S. at 278-79).

[94] JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980).

[95] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV.

[96] "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[97] ELY, *supra* note 94, at 22-41.

The debate over substantive due process and the related debates about how to interpret the seemingly abstract terms of the Bill of Rights—such as freedom of speech or cruel and unusual punishments—are what courses in constitutional interpretation in American law schools are largely about. The terms of the debate have roughly held the same since the early 1980's. Justice Scalia's recent book, *A Matter of Interpretation*,[98] sketches some of the competing arguments while trying to break new ground. After all this time, however, most people already have their minds made up about the legitimacy of substantive due process.

Substantive due process has proved surprisingly resilient considering the academic and political criticism it has faced.[99] There may be something of American genius in it despite its flaws. In any event, as the case law discussed below shows, it is certainly defensible for ordinary legal discussion today to utilize substantive due process.

The other possible constitutional source of a constitutional right to a healthy environment is equal protection.[100] I am not referring here to equal protection cases that discuss or concern fundamental rights. Those cases, as Justice Stewart said, are "no more than substantive due process by another name."[101] I refer, instead, to the equal protection requirement of impartiality.

In a series of cases, the United States Supreme Court has suggested that it is a violation of equal protection for government to act out of animus or indifference to the needs of a particular group of its citizens.[102] As the Supreme Court pointed out, "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[103] In terms of environmental harm, today's generation may be thought of as the majority using its political muscle to permanently disadvantage future generations. Future generations, as an entirely unrepresented group, stand in as clear need of constitutional protection as do other vulnerable minorities.

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[98] Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3 (Amy Gutman, ed., 1997).

[99] Much of that criticism is made or referred to in ROBERT H. BORK, THE TEMPTING OF AMERICA (1990). *See infra* notes 316-58 and accompanying text.

[100] "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause has been held to be applicable to the federal government as well. Bolling v. Sharp, 347 U.S. 497, 500 (1954).

[101] Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring). In *Zablocki*, the Court struck down a restriction on marriage—that a resident obtain a court order to the effect that previous children are being supported—that might well have been considered constitutional in regard to a less sensitive personal interest than marriage. *Zablocki*, 434 U.S. at 388-91.

PART II—THE POSSIBILITY OF PROTECTING THE ENVIRONMENT THROUGH FUNDAMENTAL LAW

In evaluating a constitutional right to a healthy environment, the first hurdle to overcome is the feeling in the legal community that the idea is radical. In this Part, I acknowledge this feeling, but then show that the idea of federal constitutional—or otherwise fundamental—protection of the environment is not a novel idea. There are a number of available analogies.

A. *The Seeming Implausibility of Recognition of Federal Constitutional Protection of the Environment*

Most legally trained people today would consider the prospect of federal constitutional protection for the environment to be highly unlikely. If an amendment were needed to provide such environmental protection, most people would say that a federal constitutional amendment to that effect would not pass. If it were to be a matter of constitutional interpretation, the likelihood that the Constitution would be interpreted to include environmental protection would not be felt to be much greater.

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[102] The most recent holding in this line is *Romer v. Evans*, 517 U.S. 620 (1996), which struck down a Colorado constitutional amendment that prohibited the State or any local government from enacting any legislative protections on the basis of "homosexual, lesbian or bisexual orientation." *Romer*, 517 U.S. at 633-35.

[103] *Id.* at 633.

I have said as much myself,[104] and so have a number of others.[105] The many calls for a constitutional amendment to protect the environment[106] suggest that a constitutional amendment would be needed for environmental protection, as opposed to constitutional interpretation, as I propose below. Constitutional protection of the environment, from any source, is considered so unlikely that serious work about the future of environmental law and policy often does not even mention it as a possibility.[107]

There are several reasons why an interpretation of the Constitution providing federal constitutional protection of the environment seems so unlikely. First of all, a right to a healthy environment would be a non-textual right. As in the case of all non-textual rights, there would be some textual provision nominally involved,[108] but the text would not be determinative. Non-textual rights in general have had tough going in the Court in recent years, as *Washington v. Glucksberg*,[109] which upheld a state ban on assisted suicide, illustrates.

In addition, there are already numerous statutory protections for the environment.[110] It is not as if there would be no recognition of, nor action taken pursuant to, the various environmental crises facing us unless there were constitutional protection of the environment. Statutory responses always seem preferable to constitutional interpretation. Statutes carry democratic legitimacy, deal more discretely with complex issues, and are more flexible.

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[104] *See* Ledewitz & Taylor, *supra* note 21, at 618 (stating that "a right to a healthy environment is a poor candidate for judicial recognition as a fundamental right").

[105] *See, e.g.,* Opderbeck, *supra* note 74, at 225 ("It is evident that no fundamental right to a healthful environment exists and that no such right is likely to be recognized in the near future."); Frederick A.O. Schwartz, Jr., *The Constitution Outside the Courts*, 14 CARDOZO L. REV. 1287, 1293 (1993) ("[E]nvironmental issues are not suitable for constitutional adjudication.").

[106] *See, e.g.,* Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 223-28 n.52 (1998).

[107] *See* RICHARD L. REVESZ, FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY (1997); THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Marian R. Chertow et al. eds., 1997).

[108] Generally, the Due Process Clause of the Fourteenth and Fifth Amendments are involved. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973).

[109] *Glucksberg*, 521 U.S. at 723.

[110] *See* Ledewitz & Taylor, *supra* note 21, at 611-12 (listing major federal legislation).

Then there are a number of technical impediments to recognition of a right to a healthy environment. The doctrine of state action[111] would be an issue, as would be standing. The political question doctrine might also be a barrier,[112] insofar as the affirmative duties of government are concerned. For that matter, protecting the environment would require a treaty, such as the global warming accord,[113] and it is hard to see what value a constitutional right would have.

On the other hand, proposals for constitutional protection of the environment are always being made. The reason for this interest, aside from great respect for the Constitution and a corresponding hope that one's highest values would be ratified therein, is the view that the environmental crisis is deepening and that constitutional expression of environmental protection will emerge out of the developing environmental crisis.[114] Besides, despite objections and worries, constitutional protections of the environment are actually common. The next two sections will introduce the reader to some of the foreign constitutional responses and those of the states.

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[111] *See* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 1411 (8th ed. 1996) ("The 'state action' doctrine has long established that, because of their language or history, most provisions of the Constitution that protect individual liberty—including those set forth in Art. I, §§ 9 and 10, the Bill of Rights, and the fourteenth and fifteenth amendments—impose restrictions or obligations only on government.").

[112] *See* Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 854 (1990).

[113] *See supra* notes 31-34 and accompanying text.

[114] *See* Stephen D. Hampton, Comment, *Sleeping Giant: the Ninth Amendment and Criminal Law*, 29 SW. U. L. REV. 349, 365 (1991) ("As the extent of the harm modern civilization has wreaked upon the environment becomes more and more apparent, and the consequences of that damage come to affect us more, the force of the argument that there is a constitutional right to a 'healthful environment' can only grow."); Tilleman, *supra* note 73, at 403 ("Given the acceleration of environmental degradation and the intergenerational needs for a healthy environment, further efforts at judicial recognition of participation rights will continually be sought.").

In light of the presence of such constitutional provisions, it is only a matter of time before the issue is raised in a serious way at the federal level. Given the environmental danger that we face today and the likely manifestations of that danger in the relatively near future, constitutional interpretation in the twenty-first century may well contain an environmental component.

B. State Constitutional Protection of the Environment

More than thirty U.S. states have provisions in their state constitutions dealing either with the environment or with natural resources.[115] The provisions vary in type.[116] As a whole, however, the provisions have not been very effective in adding environmental protection beyond what would otherwise have occurred.[117] A few years ago, I explored the successes and failures of these state constitutional provisions.[118] Nothing has occurred since that time to alter my general conclusion:

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[115] For a recent listing, see Fernando M. Pinguelo, *Laboratory of Ideas: One State's Successful Attempt to Constitutionally Ensure A Healthier Environment*, 4 BUF. ENVTL. L.J. 269, 281 & n. 53 (1997). This list omits the November 1996 amendment of Article VIII, Section II of the New Jersey State Constitution, which is the subject of the article.

[116] *See* Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063, 1104 (1992) ("Five kinds of constitutional provisions have been adopted: (1) public policy provisions; (2) rights statements; (3) protection of specific ecosystems; (4) public trust provisions; and (5) financial mechanisms."). *See generally* Mary Ellen Cusak, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993) (discussing judicial interpretation of state constitutional provisions protecting environment).

[117] *See* Matthew Thor Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1171 (1997) ("Since the earliest environmental provisions were enacted . . . commentators have almost universally lamented their ineffectiveness."). Kirsch actually thinks that the "universal" view of the commentators may be mistaken—that some state courts have interpreted state constitutional provisions as evoking the public trust doctrine. *Id.* at 1172. *See also* Brooks, *supra* note 116, at 1105 (arguing state constitutional provisions "mandate a long-term fiduciary obligation of public action to protect and preserve environmental resources").

[118] Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental*

> It appears that the various state constitutional provisions protecting the environment have not changed the outcomes of many reported cases. These constitutional provisions have contributed to certain decisions—in the sense that a provision has been cited—but in general, it seems the outcome of the case would have remained the same even without the provision. If the purpose of enacting environmental provisions in state constitutions was to change the law in some sense, that purpose appears to have failed, at least for now.[119]

Obviously there are greater and lesser definitions of effectiveness and there are exceptions to my conclusion.[120] Nevertheless, state constitutional provisions protecting the environment do not do so in any obvious way beyond statutory and common law devices.[121] Indeed, the most likely provision to accomplish its goal is that of New Jersey, which simply creates a special account dedicating four percent of corporate business tax revenues to fund specified environmental projects.[122] The New Jersey approach did not require a constitutional amendment.

Pennsylvania's state Constitution is the most developed in the area of constitutional protection of the environment.[123] No doubt this is due in part to the breadth of the Pennsylvania text.[124] Pennsylvania's experience illustrates the problems,

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Provisions in State Constitutions, 4 EMERGING ISSUES ST. CONST. L. 33 (1991).

[119] *Id.* at 42.

[120] *See, e.g.*, Ledewitz & Taylor, *supra* note 21, at 619 n.96.

[121] Thirty states have statutory provisions that provide greater environmental protection, at least in some respects, than does federal legislation. Caldwell, *supra* note 106, at 227.

[122] Pinguelo, *supra* note 115, at 270.

[123] Kirsch, *supra* note 117, at 1188-89. This does not mean that Pennsylvania provides the most protection, of course.

[124] Article I, § 27 of the Pennsylvania Constitution provides as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these

promise and context of constitutional protection of the environment.

The potential limits of constitutional protection are demonstrated by *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[125] in which the Commonwealth sued a private company to enjoin the construction on private land of a 307 foot high observation tower that had the potential to interfere with enjoyment of the Gettysburg National Military Park.[126] The court affirmed denial of the injunction.[127]

Several factors relevant to consideration of federal constitutional protection of the environment influenced the *Gettysburg* decision. The court held that Article I, section 27 of the Pennsylvania Constitution is not self-executing.[128] In coming to that conclusion, the court noted that the provision expands the powers of government, unlike most constitutional provi-

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> resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

[125] 311 A.2d 588 (Pa. 1973).

[126] *National Gettysburg Battlefield Tower*, 311 A.2d at 589-90.

[127] *Id.* at 595. It is not clear that there is a majority opinion in the case. A full court of seven justices heard the case. The opinion denominated "Opinion of the Court" (even in the official reporter, see 454 Pa. 193, 206) is written by Justice O'Brien and joined only by Justice Pomeroy. Justice Nix concurred in the result. *National Gettysburg Battlefield Tower*, 311 A.2d at 595. Justice Roberts wrote a concurring opinion, in which Justice Manderino joined, which contained language suggesting that Justice Roberts did not join the O'Brien opinion: "I agree that the order of the Commonwealth Court should be affirmed: however, my reasons for affirmance are entirely different from those expressed in the opinion by Mr. Justice O'Brien (joined by Mr. Justice Pomeroy)." *Id.* at 595. Chief Justice Jones wrote a dissenting opinion joined by Justice Eagen. *Id.*; *see* Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in a Constitutional Setting*, 68 TEMP. L. REV. 1369, 1388-89 (1995) (discussing divided opinion).

[128] *National Gettysburg Battlefield Tower*, 311 A.2d at 594-95. For discussion of the issue of self-execution, see generally, José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333 (1993); Oliver A. Pollard, III, Note, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351 (1986); Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219 (1994).

sions, which limit the powers of government. Also, the court noted that the content of the provision is not defined; that application of the provision against private property owners threatens other constitutional rights, particularly property rights; and that enforcement actions enlarge the powers of the executive branch versus those of the legislative branch.[129] All of these concerns would be applicable in various ways to recognition of a federal constitutional right to a healthy environment.

Pennsylvania law is different, however, when the defendant is not a private party. In *Payne v. Kassab*,[130] a case in which private citizens were suing the government for environmental harm caused by the government,[131] the court allowed the plaintiffs to raise their rights under Article I, section 27.[132] *Payne* is generally considered a weak precedent,[133] particularly as later interpreted.[134] For our purposes, however, the holdings of the courts do not matter as much as the framework the decisions created. In reaching its conclusion that section 27 was not violated, the court in *Payne* held that, because state statutory law requires an administrative finding that "no feasible and prudent alternative exists and that the project under consideration is planned in such a way as to minimize the harm to the affected land,"[135] compliance with the statute satisfied constitutional requirements as well. "It is manifest that a balancing must take place, and by Act 120 . . . the legislature has made careful provision for just that."[136]

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[129] *National Gettysburg Battlefield Tower*, 311 A.2d at 592-94.

[130] 361 A.2d 263 (Pa. 1976).

[131] *Payne*, 361 A.2d at 264-65. In *Payne*, the Pennsylvania Department of Transportation was widening a street, allegedly negatively impacting the environment known as the River Common. *Id.* at 264.

[132] The majority opinion by Justice Pomeroy stated that there was "no need, in this case, to explore the difficult terrain of whether the amendment is or is not 'self-executing.'" *Id.* at 272. But, by allowing the plaintiffs to raise their rights and by deciding the case on the merits, the court seemed to decide that the provision is self-executing, at least against government action. *Id.* at 273-74. This leaves open the issue of the justiciability of government non-action.

[133] *See, e.g.*, Kirsch, *supra* note 117, at 1200-02.

[134] *See* Fried & Van Damme, *supra* note 127, at 1389-94 (noting that subsequent decisions have narrowed the *Payne* holding).

[135] *Payne*, 361 A.2d at 269.

This language is all that would be needed for a framework for federal constitutional protection of the environment. For even the recognition that environmental concerns *must* always be addressed before government action may take place is a serious constitutional limitation, which presumably the government may not remove even if temporarily politically expedient. Such a holding is far different, for example, than holding that an environmental provision is unenforceable.[137] Within such a framework, some courts will be more aggressive than others.[138] However, as recognition of the danger we now face grows, what balancing seems prudent can change as well. In other words, the *Payne* test might become more exacting if we needed it to. This is the promise of constitutional protection of the environment.

The third aspect of the Pennsylvania experience with constitutional environmental protection is as a background consideration influencing the interpretation of other legal rights. In *United Artists' Theater Circuit, Inc. v. City of Philadelphia,*[139] the court upheld the constitutionality of the Philadelphia Historic Preservation Ordinance[140] and rejected a claim that a historic designation of a building constituted a taking of property requiring compensation unless the owner consented to the historic designation.[141]

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[136] *Id.* at 273.

[137] *Compare Payne*, 361 A.2d at 263, *with* Robb v. Shockoe Slip Fund, 324 S.E.2d 674, 677 (Va. 1985) (interpreting Virginia environmental provision in state constitution as unenforceable).

[138] *See* Kirsch, *supra* note 117, at 1196-1200 (describing experience of courts in Louisiana with analogous "cost-benefit" analysis).

[139] 635 A.2d 612 (Pa. 1993).

[140] *United Artists' Theater Circuit*, 635 A.2d at 620. The court, however, did limit the application of the ordinance to the exterior of buildings on grounds of statutory interpretation. *Id.* at 621-22.

[141] *Id.* at 620. In a peculiar procedural history, the court had held in 1991, in the very same case, that an unconsented to historical designation constituted a taking per se under article I, section 10 of the Pennsylvania Constitution. *See* United Artists' Theater Circuit v. City of Philadelphia, 595 A.2d 6, 13-14 (1991).

The opinion in *United Artists' Theater Circuit* constituted an interpretation of Article I, section 10 of the Pennsylvania Constitution.[142] Essentially the court held that section 10 should be interpreted consistently with the United States Supreme Court's interpretation of "takings" under the Fifth and Fourteenth Amendments to the United States Constitution. Chief Justice Nix's opinion in *United Artists' Theater Circuit* interpreted *Penn Central Transportation Co. v. City of New York*[143] as upholding historic designation of private property against takings challenges.[144] Although Pennsylvania could interpret section 10 more broadly than the corresponding interpretation of federal constitutional law, the court declined to do that with regard to historic designation.[145]

The Pennsylvania Supreme Court often utilizes a four-part test when deciding whether to interpret a state constitutional provision more broadly than a corresponding or similar provision in the Federal Constitution.[146] The first three factors of the test are: (1) the text of the Pennsylvania provision; (2) the history of the provision, including its interpretation; and (3) related case law from other states.[147] These factors did not directly implicate section 27's protection of the environment in *United Artists' Theater Circuit*. However, the fourth factor, policy considerations,[148] did. The court held that the language of section 27 established that the preservation of historic re-

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The 1993 opinion followed reargument and constitutes the final decision in the case.

[142] PA. CONST. art. I, § 10 provides, in part, as follows: "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

[143] 438 U.S. 104 (1978).

[144] *United Artists' Theater Circuit*, 635 A.2d at 617-19.

[145] *Id.* at 615-620.

[146] *See* Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (establishing four-part test but recognizing that examination of related federal precedent may be useful).

[147] *United Artists' Theater Circuit*, 635 A.2d at 615 (citing *Edmunds*, 586 A.2d at 895).

[148] *Id.* (noting that policy considerations include "unique issues of state and local concern").

sources was now state policy to be considered when evaluating a takings challenge.[149] In effect, the court held that there was a tension between the protection of private property embodied in section 10 and the environmental values embodied in section 27.[150]

United Artists' Theater Circuit illustrates the potential importance of the recognition of a federal constitutional right to a healthy environment. Literally, this constitutional right might act as a counterweight to expansive interpretation of the Takings Clause. In addition, there are other potential federal constitutional obstacles to effective government regulation regarding environmental protection and/or to effective private citizen oversight of government action. For example, perhaps the right to a healthy environment would promote expansive interpretation of standing,[151] expand a court's remedial power, or narrow the reach of federalism concerns. A constitutional right to a healthy environment would often require consideration of the environment in deciding constitutional questions.

C. *International Constitutional and Otherwise Fundamental Law Protection of the Environment*

There are several reasons to look to international law and the experiences of other countries in considering recognition of a right to a healthy environment under the United States Constitution. For one thing, if all, or a substantial portion, of humanity recognizes a right to a healthy environment, or an equivalent right, then recognition of such a right under the Federal Constitution is not easily dismissed as a merely subjective judgment. Second, insofar as the rest of the world recognizes an environmental right and the United States does not, or

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[149] *Id.* at 620.

[150] *See id.* (concluding that designation of private building as historic did not constitute taking under Pennsylvania Constitution).

[151] A similar proposal was made by Douglas T. Kendall in 1992. *See* Douglas T. Kendall, Note, *The Limits to Growth and the Limits to the Takings Clause*, 11 VA. ENVTL. L.J. 547, 560 (1992) (arguing that Supreme Court must act on environment's behalf to protect right of future generations to live in healthy environment).

acts in contravention of such a right, it may seem that the United States is seeking its own advantage as the world's wealthiest nation. In other words, vis-a-vis other nations or future generations, important segments of the United States population may be serving selfish interests that the Constitution could help redress. Finally, the existence and use of environmental rights internationally suggests that such rights can be a matter of practical constitutional interpretation.

Increasingly, international law in various forms recognizes something similar to a right to a healthy environment. The United Nations Conference on the Human Environment held in Stockholm in 1972[152] is said to have been the first such recognition.[153] Article 21 of the Stockholm Declaration provides that states have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environments of other [s]tates."[154] It certainly could be said that carbon dioxide emissions do cause such damage. The Declaration also provides that all people have a responsibility to "protect and improve" the environment for future generations:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[155]

The idea of intergenerational equity may have achieved acceptance as an important principle of international law since Stockholm.[156]

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[152] *Report of the United Nations Conference on the Human Environment*, 1972, U.N. Doc. A/Conf. 48/14/Rev. 1, U.N. Sales No. E. 73.II.A.14 (1973).

[153] Ryan K. Gravelle, Note, *Enforcing the Elusive: Environmental Rights in East European Constitutions*, 16 VA. ENVTL. L.J. 633, 637-38 (1997) (noting that this international convention considered right to healthy environment equivalent to right to life itself).

[154] *See Report of the United Nations Conference on the Human Environment*, *supra* note 152, at 5.

[155] *Id.* at 3.

[156] *See* Edith Brown Weiss, *A Reply to Barresi's "Beyond Fairness to Future Generations,"* 11 TUL. ENVTL. L.J. 89, 96-97 (1997) (discussing recent reports

Another source of general international environmental norms is the Rio Declaration on Environment and Development,[157] which proclaimed twenty-seven principles to guide "sustainable development."[158] The first principle states: "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy life in harmony with nature."[159] The Rio Declaration also endorses the precautionary principle,[160] under which "government authorities [are] to err on the side of environmental and health protection when formulating public policy whenever the context is characterized by uncertain scientific conditions."[161] The Precautionary Principle, the relevance of which to various potential environmental crises is obvious, may already be a principle of customary international law.[162]

Between Stockholm and Rio, a number of attempts were made in the international arena to establish environmental protection as positive international law.[163] These efforts large-

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which recognize emergence of notion of intergenerational equity).

[157] *Report of the United Nations Conference on Environment and Development*, U.N. GAOR, 47th Sess., U.N. Doc. A/CONF. 151/26 (Vol. I (1992)).

[158] *Id.* at Principles 1-27. The Rio Declaration is regarded as the first official recognition of the principle of sustainable development. J.A. Lindgren Alves, *The United Nations, Postmodernity, and Human Rights,* 32 U.S.F. L. REV. 479, 492 (1998) (noting that Rio Declaration was first document adopted by UNCED, United Nations Conference on Environment and Development).

[159] *See Report of the United Nations Conference on Environment and Development, supra* note 157, at Principal 1.

[160] *Id.* at Principle 15.

[161] Michele D. Carter, Note, *Selling Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormones Controversy*, 6 MINN. J. GLOBAL TRADE 625, 643 (1997) (discussing reasons for EC's position on growth hormones).

[162] *See* Lisa K. Seilheimer, Note, *The SPS Agreement Applied: The WTO Hormone Beef Case*, 4 ENVTL. LAW 537, 559 n.194 (1998) (discussing development and use of precautionary principle in international law). *See generally* Chris W. Backes & Jonathan M. Verschuuren, *The Precautionary Principle in International, European, and Dutch Wildlife Law*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 43 (1998) (discussing potential influence precautionary principle has on nature conservation legislation).

[163] *See* Caldwell, *supra* note 106, at 229-31 (noting that "increased understanding of the transnational character of environmental problems" led to this result).

ly failed, in part because of opposition from the United States.[164] Nevertheless, international law may certainly be said to be moving in the direction of recognition of environmental rights.[165]

Aside from full international law status, there are other mechanisms through which environmental protection might become enforceable in some sense in the international arena. For example, there are existing multi-party agreements that might be interpreted to already include a right to a healthy environment,[166] or that expressly provide some level of environmental protection.[167] There have also been suggestions that certain egregious, environmentally harmful acts could be treated as crimes under international law, much as crimes against internationally recognized human rights are treated as crimes by most states, including the United States.[168]

Many individual states have environmental provisions in their national constitutions. In 1989, in her classic work, *In*

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[164] For example, the United States cast the only dissenting vote when the United Nation's 1982 World Charter for Nature was endorsed by U.N. General Assembly. World Charter for Nature, G.A. Res. 7, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A//res/37/7 (1982). However, the Charter was not an important step forward in environmental law. Caldwell, *supra* note 106, at 229-30 (stating that Charter gives no means to enforce compliance).

[165] *See* Gravelle, *supra* note 153, at 657 (noting that there has been increasing recognition of environmental rights as they relate to human rights). *See generally* Iveta Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?*, 7 CONN. J. INT'L L. 65 (1991) (discussing international documents, regional treaties, and national legislation which evidence growing awareness of environmental rights).

[166] *See, e.g.,* Van Dyke, *supra* note 73, at 373 n.6 (noting that many recognize Stockholm Declaration as initiating international recognition of right to healthy environment).

[167] *See* F. Michael Willis, Note, *Economic Development, Environmental Protection, and the Right to Health*, 9 GEO. INT'L ENVTL. L. REV. 195, 210 (1996) (noting regional agreements that provide environmental protection through recognized right to health).

[168] *See* Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law*, 11 B.U. INT'L L.J. 327, 340-48 (1993) (discussing importance of recognizing and adjudicating crime of geocide); Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215 (1996) (concluding ecocide could and will be recognized as international crime since it resembles accepted international crimes).

Fairness to Future Generations,[169] Edith Brown Weiss listed thirty-four countries with some version of a constitutional obligation to protect the environment.[170] The international situation has changed since 1989, especially because of the end of the cold war and the fragmentation of the Soviet Union. Recent estimates of the number of countries with some sort of environmental protection are higher.[171]

What is most impressive about the breadth of national constitutional protection of the environment is the unmistakable trend toward such protection. "[V]irtually every constitution adopted or reversed since 1970, either state[s] the principle that an environment of a specified quality constitutes a human right or impose[s] environmental duties upon the state."[172] For example, all of the newly emerging democracies of Eastern Europe have adopted new constitutions that contain a right to environmental protection.[173]

While almost all of the constitutional standards referred to above have resulted from express textual recognition of the environment, case law has played a role as well. Two well-known cases are *Pedro Flores y Otros v. Corporacio'n del Cobre, Codelco, Divisio'n Salvador*,[174] from Chile, and *Minors Oposa v. Secretary of the Department of Environment and Natural Re-*

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[169] WEISS, *supra* note 79.

[170] *See id.* at 107 (noting that although few constitutions address future generations, many require their governments and citizens to protect environment).

[171] Estimates differ, presumably because the counting is done at different times and with different definitions. *Compare* Willis, *supra* note 167 at 211 (estimating sixty constitutions with such protection) *with* Dinah L. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L., 103, 138 n.5 (1991) (estimating forty-four national constitutions and twenty state constitutions with such protection).

[172] Dinah L. Shelton, *Environmental Rights in the European Community*, 16 HASTINGS INT'L & COMP. L. REV. 557, 565 (1993) (noting influence constitution of member states has on human rights law of European community).

[173] *See* Gravelle, *supra* note 153, at 644 (stating that Russian Federation Constitution exacts certain punishments for those who damage environment).

[174] Recurso de Proteccio'n, Copiapo, Corte Suprema, July 28, 1988, Rol. 12,753, Fs. 641, (Chile), *translated in* 2 GEO. INT'L ENVTL. L. REV. 251 (1989). *See also* Gravelle, *supra* note 153, at 660 n.148.

sources,[175] from the Philippines.

In *Pedro Flores*, the Chilean Supreme Court ordered a copper mining company to build a dam for waste disposal and to cease polluting the nearby area.[176] The court acted despite the lack of a legislative mandate, pursuant to a constitutional provision that guarantees "[t]he right to live in an environment free from contamination."[177]

In *Minors Oposa*, the Supreme Court of the Philippines upheld an intergenerational claim to halt government timber licensing agreements based on constitutional text providing for the right "to a balanced and healthy ecology."[178] Aside from its importance as a standing case, the Court in *Minors Oposa* indicated its willingness to recognize environmental constitutional rights even without a textual reference: "[T]hese basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[179] Obviously, this language could in part support the idea of recognizing such an environmental right under the United States Constitution.

In another line of cases with potential implications for United States constitutional interpretation, the Italian courts have been willing to expand standing in light of the implications of a constitutional right to "health" for the protection of a healthy environment.[180] These cases suggest a possible role for courts in the United States in expanding interpretation of the United States Constitution in regard to the environment.

On the other hand, an important example of judicial resistance to implication of a constitutional right to environmental protection from broad and general, but non-environmental language, is the jurisprudence of the German Federal Constitutional Court. Despite proposals to derive environmental protection from aspects of, or an overall implication from, the German basic law, the Court and most German scholarship have resisted such an interpretation.[181] Furthermore, as a general matter, there has been criticism of the very idea of constitutional protection of the environment, from whatever sources derived.[182]

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[175] 224 SCRA 792 (1993) (Philippines), *reprinted in* 33 I.L.M. 173 (1994).

[176] *See supra* note 174, at 269.

[177] Constitucion Politica De La Republica de Chile, art. 19, no. 8, *translated in* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 42 (Albert Blaustein & Gisbert H. Flanz, eds., 1991).

[178] PHIL. CONST. art. II, sec. 16, *reprinted in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, 168 (Albert Blaustein & Gisbert H. Flanz, eds., 1986).

[179] *Minors Oposa*, 33 I.L.M. at 187.

[180] *See* Parker, *supra* note 74, at 281; *see also* Arrondelle v. United Kingdom, 26 EUR. COMM'N H.R. DEC. & REP. 5 (1982) (holding that noise pollutant claim could be heard before European Commission of Human Rights, under Conservation for Protection of Human Rights and Fundamental Freedoms Act).

What emerges from consideration of the international status of a constitutional right to environmental protection in some form, is that whatever the merits of the idea, variants of the right are in force currently. Thus, whether ultimately the right comes to be seen as symbolic and rhetorical or as enforceable and an aid to interpretation of other legal materials, the issue of constitutional environmental protection is already engaging legal systems around the world. Is there a similar history of consideration of constitutional environmental protection in the United States?

D. The History of Federal Constitutional Protection of the Environment

No history exists regarding federal constitutional protection of the environment. The idea of federal constitutional protection of the environment has never achieved enough acceptance to warrant considering the efforts described below as a "history" of anything. It has been rightly said that as far as the environment is concerned, "the U.S. Constitution is silent."[183]

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[181] Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 32-33 (1992). The dominant view is that German basic law provides no basis for inferring a fundamental right regarding the protection of the environment. *Id.* at 33.

[182] *See, e.g.*, Cass R. Sunstein, *Against Positive Rights*, E. EUR. CONST. REV., Winter 1993, at 35-38.

[183] Jennifer M. Gleason & Bern A. Johnson, *Environmental Law Across Borders*, 10 J. ENVTL. L. & LITIG., 67, 79 (1995).

Various legal arguments in favor of the recognition of such a right have been rejected.[184] Most of the cases arose during the 1970's, in claims concerning exposure to tobacco smoke or other immediate insults to a relatively local environment. At about the same time, proposals for a federal constitutional amendment of a much broader scope were being developed and even introduced in Congress. No such proposed amendment, however, has come remotely close to passage.

The lack of previous success in the establishment of federal constitutional protection of the environment is not an insurmountable barrier to the recognition of such a right now. Nevertheless, it seems clear that no such constitutional protection will be recognized—or for that matter, no such amendment passed—unless the environmental problems described above in Part I begin to manifest serious and recognizable symptoms. If the projected harms do not begin to materialize, no change in the law will occur. On the other hand, if serious harm does occur, as predicted, there may well be a felt need for a constitutional response. In that case, prior negative precedents likely will be overcome by changed circumstances.

The very fact that repeated efforts to constitutionalize environmental protection have been made may turn out to be more significant than the immediate results of those attempts. Constitutional recognition of the environment may one day be seen as an issue that would not go away.[185] When judges begin to feel that environmental protection must have a basis in the Constitution, these failures may be seen as evidence that the underlying issue touched deep chords in American society.

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[184] During the 1970's, a number of law review articles made the case for constitutional recognition of environmental protection. *See* John C. Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. C.R.-C.L. L. REV. 32, 45-52 (1970); E.F. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, *in* LAW AND THE ENVIRONMENT 134-65 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970); John Y. Pearson, Jr., Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 458-86 (1970); *see also* STONE, *supra* note 86, at 53-54; William D. Kirchick, *The Continuing Search for a Constitutionally Protected Environment*, 4 ENVTL. AFF. 515, 515-40 (1975); David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 642-43 (1970). For more recent treatment, see James E. Krier, *The Environment, the Constitution, and the Coupling Fallacy*, 32 LAW QUADRANGLE NOTES, Spring 1988, at 35.

[185] For some of the early arguments in favor of recognition of federal constitutional protection of the environment, see Roberts, *supra* note 184, at 134-65; Sive,

The history of federal constitutional protection of the environment should be conceptualized as including broad statutory language endorsing protection of the environment. Here, the record of concern for the environment is much stronger. Section 101(c) of the National Environmental Policy Act (NEPA),[186] which states that "[t]he Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment"[187] is the most important such pronouncement. Such language may not be directly enforceable, but it does announce a national policy under which enforceable constitutional norms may one day be derived.

1. *Case Law*

One of the first cases to discuss a possible federal constitutional right regarding the environment was *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*.[188] *Environmental Defense Fund* is similar to a number of the cases that followed, in that the plaintiffs raised a broad claim of environmental protection based on various constitutional sources, which the court rejected.[189] The exceptional aspect of *Environmental Defense Fund* is the strong underlying sympathy for the plaintiff's claim evinced by the court's language.[190]

Environmental Defense Fund involved efforts to enjoin the construction of the Gilham Dam across the Cossatot River.[191] In denying a request for preliminary injunctive relief, the court

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supra note 184, at 642-43; Pearson, *supra* note 184, at 458-86.

[186] 42 U.S.C. §§ 4321-4370d (1994).

[187] 42 U.S.C. § 4331(c) (1994).

[188] 325 F. Supp. 728 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972).

[189] *Environmental Defense Fund*, 325 F. Supp. at 730-31, 733-34, 738-39.

[190] *Id.* at 738-39.

[191] *Id.* at 730.

considered whether the plaintiffs would prevail on their claims.[192] The issue of constitutional protection for the environment arose in terms of the plaintiff's "Seventh Cause of Action," which the court held did "not state facts which would under the present state of the law constitute a violation of their constitutional rights."[193] The seventh cause of action stated in part as follows:

> The right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life, is part of the liberty protected by the Fifth and Fourteenth Amendments to the Constitution of the United States . . . and is also one of those unenumerated rights retained by the people . . . as provided in the Ninth Amendment.[194]

The court did not ridicule the claim, but did reject it:

> Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. Others have proposed amendments to our Constitutions for this purpose. . . . Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition.[195]

But not at that time, not in that court. The court encapsulated both its sense that an environmental constitutional right lies in the future of legal development and that a lower court should not be the first court to act, by quoting Judge Learned Hand who expressed, "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."[196]

A third concern, beyond anticipating the future and the institutional role of a lower court, advised rejection of the proposed constitutional value—the separation of powers, which cautioned that "final decisions in matters of this type must rest with the legislative and executive branches of government."[197]

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[192] *Id.* at 737-49.

[193] *Id.* at 739.

[194] *Id.*

[195] *Id.*

[196] *Id.* (quoting Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809 (2d Cir. 1944)).

Another early case that would presage later developments against recognizing a constitutional environmental right was *Tanner v. Armco Steel Corp.*[198] *Tanner* involved a damage action for exposure to air pollutants from a refinery.[199] The action was premised in part on a purported federal constitutional environmental right.[200] The court held that the complaint failed to state a cause of action.[201]

Among other issues, the court held that there was no state action, that there would be no standards to guide the exercise of judicial decision-making were such a constitutional right to be found, and that environmental rights are ill suited to judicial determination.[202] The language on this last point is particularly relevant:

> [F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relegate to the ad hoc process of 'government by lawsuit' in the midst of a statutory vacuum.[203]

Later case law rejecting a federal constitutional right to environmental protection would echo the themes of *Environmental Defense Fund* and *Tanner*.[204]

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[197] *Id.* at 739.

[198] 340 F. Supp. 532 (S.D. Tex. 1972).

[199] *Tanner*, 340 F. Supp. at 534.

[200] *Id.* at 534-37.

[201] *Id.* at 539.

[202] *Id.* at 536-37.

[203] *Id.* at 536.

2. *Constitutional Amendment*

The existence of proposals for federal constitutional amendments to provide for protection of the environment constitutes an argument both for and against recognition of such a right in the absence of an amendment. On the one hand, the continuing serious interest in an amendment tends to show fundamental societal concern for constitutional protection of the environment. On the other hand, of course, the need for an amendment tends to suggest that no implication of the right is possible or coherent. It was this latter tendency that led the court in *Tanner* to quote one of the sponsors of a proposed federal environmental amendment:

> We are frank to say that such a provision to the Constitution would have been meaningless to those attending the Constitutional Convention in Philadelphia almost 200 years ago. Indeed, this amendment would have been altogether unpersuasive twenty years ago, although the handwriting was then visible on the wall, if one cared to look for it.[205]

Proposals for an environmental constitutional amendment have been made from the dawn of the modern environmental age. Representative Charles E. Bennett proposed such an amendment in 1967.[206] Representative Richard Ottinger[207] made similar proposals in 1968, and Representative Morris Udall made such proposals in 1970.[208] Legislative efforts to amend the Federal Constitution continue.[209]

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[204] *See generally* Gordon v. Raven Sys. & Research, Inc., 462 A.2d 10, 14 (D.C. App. 1983) (citing cases); Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1212-13 (D.N.J. 1978) (citing cases). Insofar as state or local officials are concerned, a federal constitutional right would also raise federalism concerns. *See* Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971). Judicial rejection did not necessarily mean complete lack of sympathy. *See In re* "Agent Orange" Product Liability Litigation, 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (stating that "there is not yet a constitutional right to a healthful environment"); *Township of Long Beach*, 445 F. Supp. at 1212 (stating that "such a legal theory may be appealing").

[205] *Tanner*, 340 F. Supp. at 536 (quoting remarks of Representative Richard L. Ottinger of New York).

Actual constitutional protection of the environment in state constitutions[210] also has ambiguous implications for interpretation of the current federal constitutional text. The effort in the states to provide constitutional protection of the environment did not proceed through interpretation after all, but rather through amendment.

There has also been academic support for a federal constitutional amendment to protect the environment.[211] Of course, there has been criticism of such proposals as well, in part concerning the need for such an amendment, and in part concerning the issue of amending the Constitution in general. Among supporters of the general idea of such an amendment, there is opposition to an amendment based on a concept of rights.[212] This has led to proposals for a constitutional amendment based not on individual rights, but on responsibilities or obligations of government.[213]

Thus far, efforts to amend the Federal Constitution to provide for some sort of environmental protection have not come close to success. For that matter, the experiences of the states, where such language has been added to constitutions, suggests that an amendment by itself would not necessarily change anything.[214] The impact of constitutional amendment or interpretation will likely depend on the sense of urgency that gives rise to them.

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[206] H.R.J. Res. 854, 90th Cong. (1967).

[207] H.R.J. Res. 1321, 90th Cong. (1968).

[208] H.R.J. Res. 1205, 91st Cong. (1970).

[209] *See* Richard L. Brodsky & Richard L. Russman, *A Constitutional Initiative*, DEFENDERS, Fall 1996, at 37 (describing bipartisan coalition of state legislators agreeing to sponsor resolutions requesting that Congress send proposed Environmental Rights Amendment to states for ratification).

[210] *See generally supra* notes 116-22 and accompanying text (discussing various state constitutional provisions).

[211] *See* BRUCE E. TONN, THE COURT OF GENERATIONS: A PROPOSED AMENDMENT TO THE U.S. CONSTITUTION (1990); Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181, 182-216 (1994).

[212] *See, e.g.*, J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, NAT. RESOURCES & ENV'T, Winter 1997, at 46, 47-48.

[213] *See, e.g.*, Caldwell, *supra* note 106, at 226. A hybrid between the rights and obligations approach is possible as well. The Pennsylvania state constitutional provision is such a hybrid. *See supra* note 124 and accompanying text.

3. *Statutory Policy*

The United States came closer to a general statutory right to environmental protection when the National Environmental Policy Act became law in 1969. NEPA is the closest thing America has to a policy statement on the environment. But it has never become a kind of environmental Magna Carta, by which to measure all the actions and inactions of government, and perhaps even those of private parties.

The limitations of NEPA have been made clear in case law. In *Tanner*, for example, the Court considered not only a constitutional right to environmental protection, but also causes of action under NEPA.[215] In part, the court repeated earlier holdings to the effect that 42 U.S.C. §§ 4321 and 4331(a) do not create substantive private rights to environmental protection.[216]

The court's most important statement recognized the precatory nature of 42 U.S.C. § 4331(c), which states that "Congress recognizes that each person should enjoy a healthful environment."[217] In *Tanner*, the plaintiffs were suing a private refinery for its air pollution.[218] Had the plaintiffs been successful, NEPA would have become a kind of super statute, providing a generalized environmental cause of action and inviting the courts to create substantive standards of liability. The court held that the actual language in NEPA constituted merely "words of entreaty," which could not be construed to create a broad private cause of action for environmental harm.[219]

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[214] *See supra* notes 118-21 and accompanying text. *See also* Pollard, *supra* note 128 at 354-63 (discussing issue of self-execution).

[215] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 534-39 (S.D. Tex. 1972).

[216] *Id.* at 537-38. 42 U.S.C. § 4321 was held to constitute merely a preamble to the Act, involving in itself no rights or remedies. *Id.* at 537. The court acknowledged the language of 42 U.S.C. § 4331(a), which declares that "it is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony." *Id.* at 538. This broad language, however, creates no personal rights. *Id.* at 538-39.

[217] *Id.* at 538.

[218] *Id.* at 534.

This textual holding would have plainly been sufficient to convince the court that NEPA creates no substantive environmental right.[220] But the court's view was bolstered by the legislative history of 42 U.S.C. § 4331(c). The previous Senate version of the bill contained much stronger language: "Congress recognizes that each person has a fundamental and inalienable right to a healthful environment."[221] This language, the court's opinion stated, "might arguably have been construed as creating a legally enforceable right to a 'healthful environment.'"[222] By implication, that language might well have allowed precisely the type of lawsuit the plaintiffs were trying to bring in *Tanner*. But this strong language was removed by the Conference Committee, in part to forestall the possibility of just such a private cause of action.[223]

There are, of course, many federal statutes that create enforceable legal rights with regard to numerous and important aspects of the environmental crises that confront us.[224] However, NEPA is the only federal statute that speaks in general terms that could relate to all aspects of the environment. NEPA is the only possible source of a general, federal, private environmental cause of action.

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[219] *Id.* at 538.

[220] *Id.* at 538-39.

[221] *Id.* at 539.

[222] *Id.*

[223] *Id.* The NEPA experience was reenacted, so to speak, in President Clinton's Executive Order to promote environmental justice—Exec. Order No. 12,898—which was promulgated after the defeat of the Environmental Justice Act. *See* Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 138 n.103 (1998) ("While declaring that each federal agency 'shall make environmental justice part of its mission,' the Executive Order refused to create or acknowledge a right to a clean environment. Exec. Order No. 12,898, § 1-101. 'This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity.' *Id.* at § 6-609."). There would be some question whether a President could, in any event, create such a cause of action by Executive Order. Chai v. Carroll, 48 F.3d 1331, 1339 (4th Cir. 1995).

The failure of NEPA to live up to its potential[225] creates a gap in broad environmental protection in the United States. That gap could be filled by constitutional interpretation, or it could be left to Congress and/or the President to act in the future. But the legislative history of NEPA demonstrates that an effective environmental right almost became law once before. Certainly, that must be comforting as we consider whether such a right should be derived now.

PART III—METHODS OF CONSTITUTIONAL INTERPRETATION RELEVANT TO THE RIGHT TO A HEALTHY ENVIRONMENT

Quite apart from the controversies surrounding claims about impending environmental crises, the use of substantive due process and equal protection to establish a federal constitutional right to a healthy environment raises issues in the realm of constitutional jurisprudence. Before attempting to apply these doctrines to the environment, this Part describes the doctrines themselves, places them in context, and attempts briefly to explain the opposition to their use.

A. The Role of Judges

1. Constitutionalism Without Courts

In that area of American constitutional law known as constitutional jurisprudence,[226] there is a great deal of opposition to any use of substantive due process and related opposition to the use of certain forms of equal protection.[227] By committing considerable violence to the subtlety of thought displayed in the literature, this opposition can be classified as predominantly methodological or predominantly democratic. The methodological objection is that substantive due process is not a persuasive form of interpretation of the Constitution.[228] The democratic objection is that substantive due process[229] amounts to "judi-

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[224] *See* Russell, *supra* note 223, at 138-39 (explaining that no federal law creates right to clean environment, but several environmental protection acts have been enacted); *see generally* Ledewitz & Taylor, *supra* note 21, at 611-12 (noting laws enacted by both Congress and state legislatures).

[225] *See generally* Caldwell, *supra* note 106, at 205-07 (discussing NEPA's lack of impact on environmental protection).

[226] I am referring to current and recent debates about the proper methods by which to interpret the Constitution, without direct reference to the meaning of

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particular constitutional provisions. This is sometimes called Constitutional Theory. *See, e.g.*, MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY (1993).

[227] *See generally* ELY, *supra* note 94, at 1 (explaining interpretivism as school of constitutional thought); Ira Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. DAYTON L. REV. 579, 581 (1983) (explaining "interpretive review").

[228] The methodological critique can be further subdivided. One objection is epistemological—judicial opinions in the substantive due process area purport to resolve moral or ethical issues that do not have objective answers. *See, e.g.*, BORK, *supra* note 99, at 111 (stating that "[abortion] raises profound moral issues upon which people of good will can and do disagree"); Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 25 (1981) ("Noninterpretivism's first requirement is that the judiciary separate that which is fundamental from that which is not, and it is this very task that requires the judiciary to take normative and moral positions that cannot be demonstrated."). This objection is premised upon a skepticism toward knowledge in ethics and morality.

Another objection is, for want of a better word, hermeneutic—the rights derived from substantive due process methodology, whether abortion or a right to die or whatever, are just not "in" the text of the Constitution. *See* BORK, *supra* note 99, at 112 ("[T]he right to abort, whatever one thinks of it, is not to be found in the Constitution."). Any method of interpretation that purports to derive rights from the essential emptiness of substantive due process is felt to not really be interpretation at all. This is the point John Ely makes when he writes that "if your job is to interpret the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time." ELY, *supra* note 94, at 12.

[229] The use of the Equal Protection Clause has not raised the same widespread and well-developed objections, probably because the case law in the area of equal protection is not as well developed. Nevertheless, the objection against such use in the name of democracy has certainly been raised—in particular by Justices Scalia and Thomas. *See* Board of County Comm'r, Wabaunsee County v. Umbehr, 518 U.S. 668, 709 (1996) (Scalia, J., dissenting) (referring to Romer v. Evans, 517 U.S. 620 (1996), along with other cases, as "a major step in the abridgment of the people's right to govern themselves").

cial usurpation of democratic prerogatives."[230]

These objections are related. All judicial review that overturns the decisions of democratically elected officials can be said to be anti-democratic.[231] No one participating in these constitutional jurisprudence debates, however, objects to judicial review in general. Therefore, it may be said that a proper interpretation of the Constitution does not raise the issue of the "countermajoritan dilemma."[232]

But, of course, this way of looking at things is circular. To know whether a judicial decision is an anti-democratic use of judicial power, one needs a theory of proper interpretation. But any theory of interpretation of the Constitution is likely to take as its premise the fact that, in judicial review, unelected judges are doing the interpreting.[233] Thus, the method of interpreting the Constitution and the political theory of the role of judges are related.

Laurence Tribe has tried to break this circle by separating these concerns—that is, separating the issue of interpretation of the Constitution from the issue of a judge's role. Tribe criticizes general objections to expansive interpretation of the Constitution that are premised on the need to put limits on judges: "[I]t puts the cart before the horse to insist upon reading constitutional phrases as meaning no more than the judiciary, with its undoubted institutional limitations in a constitutional republic, can be trusted reliably to discern and enforce."[234]

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[230] BORK, *supra* note 99, at 115-16.

[231] This was Thomas Jefferson's objection to having a binding Constitution at all: "[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, 1789, at 395-96 (Julian P. Boyd ed., 1958).

[232] For the history of what is called the countermajoritarian dilemma or difficulty, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-43 (1998). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962) (explaining countermajoritarian dilemma); LOUIS LUSKY, BY WHAT RIGHT 68-84 (1975) (explaining constitutional interpretation); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 249-301 (1995) (comparing United States' constitutional interpretation to that of France and Canada).

[233] *See* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 553 (1987) ("[S]ubstantive due process results in an unprincipled jurisprudence . . . [and] is undemocratic because it permits unelected judges to overturn the decisions of the people's representatives.").

The separation of concern about the role of judges from judgments about the proper approach to interpreting the Constitution allows us to see the Constitution in a different and broader light. Many applications of constitutional principles occur outside courts. This is true on an obvious level because, knowing what a court would do in a particular situation, most of us, including government officials, simply follow what courts have said in the past about a particular legal issue. Citizens normally do not have to sue to enjoy their constitutional rights—or, indeed, their other legal rights.

There is another sense in which the Constitution is applied outside the courtroom. Not only do government officials other than judges enforce the Constitution, they sometimes do so without any direct reference to what courts might say about a particular context. This is obviously the case with regard to "political question" issues, to which the courts do not speak.[235] But it can also be the case whenever a "conscientious" government official acts in a constitutional system.[236]

The most significant sense in which the Constitution is interpreted outside the courtroom, however, does not involve government officials directly at all. All sorts of American political movements make claims about their constitutional rights without regard for the interpretation courts may have placed on a particular constitutional provision.[237] The National Rifle

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[234] Laurence H. Tribe, Comment, *in* A MATTER OF INTERPRETATION, at 90. *See also* SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER, 197-99 (1993) (analyzing anti-realism metaphysics approach to interpretation).

[235] *See, e.g.,* Nixon v. United States, 506 U.S. 224, 237-38 (1993) (holding procedures used by Senate in impeachment trial represents nonjusticiable political question).

[236] *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975).

[237] *See* Ledewitz & Taylor, *supra* note 21, at 624-33 (citing takings clause and

Association, for example, is not deterred from its view of the Second Amendment by the fact that the courts tend to interpret the amendment in terms of state militias only.[238] On the other side of the political street, anti-death penalty abolitionists claim the death penalty is an unconstitutional, cruel and unusual punishment despite *Gregg v. Georgia.*[239] Citizens feel free to do this because the Constitution is not a technical document, but a political one—in the most honorable sense of that term.[240] Ultimately, the only interpretation of the Constitution that lasts is an interpretation that the people come to accept.

This is the gist of historian Gordon S. Wood's response to Justice Scalia's call for a more restrained judicial interpretation of the Constitution.[241] In effect, Wood suggests that Justice Scalia accepts, indeed overlooks, the really fundamental expansion of judicial power:

> [T]he most important element in the development of judicial review was the treating of the constitution as a statute—a superstatute no doubt, but nevertheless one that could be interpreted in the ordinary court system. Some of the Founding Fathers, including Jefferson and Madison, tended to conceive of the Constitution as a law that was too fundamental and awesome to be restricted to ordinary judicial interpretation. . . . When the several department disagreed in their understanding of the fundamental law, wrote Madison in The Federalist No. 49, "an appeal to the people themselves, . . . can alone declare its true meaning, and enforce its observance."[242]

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other examples).

[238] *See* United States v. Miller, 307 U.S. 174, 178-79 (1939) (finding that Second Amendment limitation inapplicable to congressional firearms controls not shown to interfere with preservation of state militia).

[239] 428 U.S. 153 (1976), *vacated* 429 U.S. 875 (1976). The Court held that the death penalty does not per se violate the Eighth Amendment. *Id.* at 178.

[240] *See* Bruce Ledewitz, *Could the Death Penalty Be a Cruel Punishment?*, 3 WIDENER J. PUB. L. 121, 133-34 (1993).

[241] Gordon S. Wood, Comment, in A MATTER OF INTERPRETATION, at 49-63.

[242] *Id.* at 61-62.

Marbury v. Madison[243] and other decisions of the Marshall Court represented the triumph of a contrary point of view, collapsing "the age-old distinction between fundamental and ordinary law."[244]

Ironically, it is this expansion of the potential for direct judicial enforcement of constitutional rights that now seems to stand in the way of any popular and potentially transformative interpretations of the Constitution. Because lawyers and judges have come to dominate constitutional interpretation, citizens must remind themselves that there is no impediment in the political Constitution[245] to the derivation of expansive constitutional rights, particularly at a time in which the future of humankind may be at stake. In deciding whether there is, or could be thought to be, a constitutional right to a healthy environment, we need not be deterred by fear of what some judge might do in the future with the authority to interpret the Constitution.

Nevertheless, old habits die hard, particularly in law professors. Despite these observations, I will go on in the rest of this article assuming that it will usually be judges who enforce whatever the right to a healthy environment turns out to mean. But the reader should always remember that even if the courts refuse to act, the Constitution is an open and revolutionary document.

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[243] 5 U.S. (1 Cranch) 137 (1803).

[244] Wood, *supra* note 241, at 62.

[245] In using the term "political Constitution," I do not mean to undermine the Constitution's status as law. The Constitution is binding, whether or not a case is brought in court. A legislator, for example, is bound to apply the Constitution even if public opinion prefers an unconstitutional course. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 1-7, 1-9, 5-1, 16-20 (2d ed. 1988) (stating government officials obligated to heed Constitution over wishes of constituents). The term political Constitution refers to the origin of norms—in the political arena rather than in the courtroom—not their binding quality.

There are those who believe nothing is law unless a court stands ready to enforce it. But not every legal right is enforced by court order and, in any event, court orders are themselves sometimes evaded.

2. *Judicial Enforcement of Quasi-Fundamental Statutes*

Aside from constitutionalism without courts, there is another avenue for the utilization of expansive interpretation of rights without the usual fear of unchecked judicial power. There is as yet no name for this approach, but it is related to the idea in British constitutional thought of fundamental statutes.

Professor Dick Howard describes the British Constitution, which is not a single document, as having an "organic evolving quality, in which major 'liberty' documents like the Magna Carta, the Petition of Right, and the Bill of Rights are not so much statutory enactments as they are restatements or declarations of fundamental rights and principles."[246]

It is beyond my scope here to enter the debate about the extent to which Parliament is really "bound" by these fundamental statutes and could not simply repeal them.[247] Certainly, such fundamental statutes are understood as different from ordinary statutes.

Because the United States has a written Constitution, we do not speak of fundamental statutes here. In our system, the Constitution is fundamental and statutes are not.

But not all statutes are equal. In America, we have a few statutes that are analogous to the fundamental statutes of the British Constitution. The best examples are habeas corpus for state prisoners,[248] the cause of action for deprivation of feder-

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[246] A.E. Dick Howard, *The Indeterminacy of the Constitution*, 31 WAKE FOREST L. REV. 383, 393 (1996).

[247] *Compare* Thomas B. McAffee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CIN. L. REV. 107, 166 n.192 (1992) (citing J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY, 174-91 (1995)) ("It has been observed that the English people continue to see the British constitution as embodying fixed principles of a fundamental nature, which Parliament is (in some sense) obligated to observe, notwithstanding the doctrine of legislative sovereignty that still controls there."), *with* Satvinder S. Juss, *The Constitution and Sikhs In Britain*, 1995 BYU L. REV. 481, 487-88 n.27 (1995) ("The fact is that provisions of allegedly fundamental statutes have been amended or repealed . . . .").

[248] 28 U.S.C. §§ 2241-2255 (1994). Section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court

al rights under color of state law, 42 U.S.C. § 1983,[249] and the federal question jurisdictional statute, 28 U.S.C. § 1331.[250]

These three statutes may be considered fundamental in the sense that, although they are statutes—Congress passed them at a certain point[251] and before that point, the rights they embody did not exist—they now form the framework for the protection of civil liberties in the United States, and it is inconceivable that Congress would repeal them. These statutes form the core of the "vast transformation"[252] in the role of the federal courts that took place after the Civil War.[253]

What is important in the environmental context about these statutes is that the United States Supreme Court has en-

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> shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution of laws or treaties of the United States.

28 U.S.C. § 2254(a) (1994).

[249] 42 U.S.C. § 1983 provides:

> Every person who, under color of any stature, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994).

[250] 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1994).

[251] Respectively, Law of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385; Law of April 20, 1871, ch. 22 § 1, 17 Stat. 13; and Law of March 3, 1875, ch. 137 § 1, 18 Stat. 470.

[252] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[253] For an account of the expansion of federal judicial authority during this period, see generally William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969).

gaged in broad policymaking pursuant to them, while Congress has retained ultimate policy control. Thus, the objections raised against expansive constitutional interpretation have not generally arisen with regard to habeas corpus, 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

There are many examples of judicial policymaking in this context, virtually without input from statutory text or from Congress in any more general sense. In terms of 42 U.S.C. § 1983,[254] the scope of municipal liability[255] and abstention[256] are Court creations. In terms of 28 U.S.C. § 1331, the fiction of *Ex Parte Young*,[257] the well-pleaded complaint rule,[258] and the so-called *Bivens* action,[259] all reflect to greater and lesser extents the Court's view of sound public policy. Of course, the best example of judicial discretion is habeas corpus, in which the Court itself first expanded the reach of the writ to "full review,"[260] only later to greatly narrow the reach of habeas corpus.[261]

Despite wide-ranging judicial decision making, Congress has from time to time intervened in the Court's interpretations of all three statutes.[262] Unquestionably Congress' view of the reach of these statutes controls.[263] Thus, both judicial creativity in terms of the needs of the day and popular control have been retained.

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[254] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815-18 (1982) (upholding "good faith" for law enforcement officials).

[255] Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 700-01 (1978) (holding that cities are "persons" under section 1983).

[256] *See* Younger v. Harris, 401 U.S. 37, 53-54 (1971) (holding that federal court may not ordinarily enjoin ongoing state court proceedings).

[257] *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997) (describing fictional aspect of doctrine of *Ex Parte Young*, which allows declaratory and injunctive relief against State officials in their individual capacity, thus effectively tying hands of State despite Eleventh Amendment).

[258] *See* Tennessee v. Union & Planters Bank, 152 U.S. 454, 464 (1894) (noting that jurisdictional determinations must focus on plaintiff's properly framed complaint).

[259] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (upholding cause of action for damages against federal officials for violation of Fourth Amendment rights).

[260] *See* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577-79 (1993) (outlining arguments in support of "full review" model for habeas corpus).

[261] *See* Teague v. Lane, 489 U.S. 288, 316 (1989) (finding that new rules of constitutional procedure are generally not cognizable on habeas corpus); Stone v. Powell, 428 U.S. 465, 494 (1976) (holding habeas relief unavailable for exclusionary rule violations).

The relevance of this quasi-fundamental statute to the environmental context is that NEPA[264] could be treated in similar fashion by the Court. Indeed, part of the point of NEPA was to be just such a statement of national policy. But in a series of cases, the Court has denied that NEPA "elevate[s] environmental concerns over other appropriate considerations."[265] Essentially, the Court has "decimated the substantive provisions of NEPA."[266] The irony is that while there have been calls to amend NEPA,[267] there is nothing wrong with the Act that a court sympathetic to the environment could not cure. Just as in the case of the three quasi-fundamental statutes discussed above, any new interpretations of NEPA would be subject to Congressional oversight. Therefore, unlike the problems raised with regard to constitutional interpretation, the Court would not have to fear unbounded judicial discretion if it began to apply, for example, the doctrine of *Payne v. Kassab*[268] generally to government activity, pursuant to NEPA.

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[262] For example, Congress codified and modified much of the Court's recent habeas corpus jurisprudence in the Antiterrorism and Effective Death Penalty Act. 28 U.S.C. §§ 2244, 2253, 2255 (1994).

[263] *Id.*

[264] The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).

[265] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).

[266] Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENVTL. L. 275, 289 (1997).

[267] *See* Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 477-79 (1990) (advocating NEPA amendments to provide greater environmental protection).

[268] *See supra* notes 130-38 and accompanying text.

B. The Right to a Healthy Environment in "Constitutional Theory"

What is generally meant by the phrase "constitutional theory" is an account, usually by an academic, of the justification of judicial review against the challenge that judicial review is anti-democratic.[269] In practice this means that an author will give a typology of arguments that might be made, or have been made, in cases, in order to show why some types of arguments are legitimate in terms of justifying judicial review, while others are not.[270] When this process is over, the author has, in effect, developed a typology of properly decided cases as well, because some results cannot be justified using certain types of arguments. So, for example, it is claimed by some that Supreme Court rulings concerning abortion, integration and reapportionment cannot be justified using an original intent methodology.[271] Therefore, insofar as following the intentions of the framers is thought necessary to justify judicial review, judicial decisions in these fields would have to be overruled or at least not expanded.[272]

Because my goal in this article is to reintroduce the issue of constitutional protection of the environment, I am not going to deal with the different approaches to constitutional interpretation in any depth. Nevertheless, following is a thumbnail sketch of how the major approaches would likely respond to the question of constitutional recognition of a healthy environment.

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[269] *See* Stephen M. Griffin, *What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 506-29 (discussing judicial review in democratic system of government).

[270] This is what is meant by deciding "'what counts as an argument.'" GERHARDT & ROWE, *supra* note 226, at 1.

[271] Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085 (1989).

[272] Rarely do originalists actually call for uprooting wide areas of established judicial decisions. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 382 (1981) (recognizing need for some theory of stare decisis).

1. Traditional Judicial Restraint

The usual political rhetoric about judges is that they merely apply the law, interpret the statute or Constitution "'strictly" and defer to the political branches of government in policy decisions.[273] It is common to refer to conservative Justices, who supposedly act this way, as practicing "judicial restraint."[274] The opposite of judicial restraint—judicial activism—is what judges are said to do when they substitute their own vision of the "good" for what the law requires.[275] In a well-known passage, Robert Bork describes the proper comportment for the judge to follow in constitutional cases:

> The United States was founded as a Madisonian system, one that allows majorities to govern wide and important areas simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma, of course, is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. It has come to be thought that the resolution of this dilemma is primarily the function of the judiciary and most especially the Supreme Court.[276]

The problem with judicial restraint as an ideal—aside from the criticism that conservative judges do not practice anything like it[277]—is that it is perfectly circular. Judges should not be restrained where legitimate individual rights are concerned, but should be restrained where they are not. When the issue is, however, whether a particular right is legitimate or not, the notion of restraint, per se, has nothing to say. To decide the question of legitimacy, one needs an approach to interpretation.

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[273] Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L.J. 1, 7 (1997) (stating that judges should apply laws in strict manner and therefore, it is not important to ask about judges' individual biases).

[274] Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role?*, 24 AKRON L. REV. 393, 394 (1990).

[275] *See* BORK, *supra* note 99, at 16.

[276] The Fifth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 119 F.R.D. 45, 60 (1987) (stating remarks of Judge Robert Bork). A slightly different version of these remarks appears in Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L. REV. 383, 383 (1985).

[277] Gottlieb, *supra* note 273, at 12 ("The conservative Justices' conclusions are based on politically charged philosophic assumptions, not interpretive canons.").

Having said that, however, the notion of judicial restraint does suggest two objections to the right to a healthy environment. First, the perspective of restraint counsels skepticism of judges playing a large role in institutional arrangements.[278] Second, an environmental right is certainly novel and novelty in law is the *bete noire* of traditional judicial restraint.[279]

As to the first objection, the mere existence of a constitutional right to a healthy environment does not indicate how far courts would be involved in restructuring institutions. Even an aggressive, environmentally active court might leave the specific details to administrative bodies.

As to the second objection, the right to a healthy environment, if it is recognized by the courts, will come to exist in light of a serious threat that ordinary political life is not capable of adequately addressing. If circumstances should come to that, even the ordinarily restrained judge should heed the words of Abraham Lincoln: "The dogmas of the quiet past are inadequate for the stormy present and future. As our circumstances are new, we must think anew, and act anew."[280]

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[278] This is one of the traditional objections to the structural injunction. *See generally* Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

[279] Thus, Justice Harlan, a true devotee to judicial restraint, once wrote that the "utter novelty" of a Connecticut statute criminalizing the use of contraceptives by married couples is "conclusive" of the statute's unconstitutionality. Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

[280] Marilyn C. Vernon & John W. Byrd, *Leadership in the 21st Century: New Roles for Federal Probation and Pretrial Services Chiefs*, 60-MAR FED. PROBATION 21, 27 (1996) (quoting R.J. Williams, *Envisioning the Courts: Old Myths or New Realities?* 46 (Fall 1996)).

2. *Interpretivism—Text / Intent / Structure*

Before the term lost currency,[281] interpretivism—as opposed to noninterpretivism—was taken to mean that judges, in interpreting the Constitution, would "confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[282] The bald way of stating this is that, in constitutional cases, judges "must not make or apply any policy not fairly to be found in the Constitution."[283] Some authors disagree about what it means to discover a norm "in" the Constitution. Three interpretive approaches are textual, original intent, and structural reasoning.

The best known, self-styled practitioner of the textual approach is Justice Antonin Scalia.[284] In interpreting the Constitution, Scalia says, the judge should aim to discover the "original meaning of the text"—as opposed to what people might mean today by the same words.[285]

There probably is not much difference between textualists in this sense and practitioners of original intent, or original understanding, which is my second category of interpretivism.[286] The best known figure here, of course, is Robert Bork, who asserts that judges must be bound by the original understanding of the text.[287] I suppose that the textualist might differ from the originalist in their unwillingness to supplement the text when the enacted text does not express the goals being sought.[288] If so, Justice Scalia should insist on interpreting the Eleventh Amendment in accordance with its language, which he does not.[289]

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[281] Thomas C. Grey, who may have originated the interpretivist-noninterpretivist dichotomy, Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975), subsequently adopted different terminology. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984).

[282] ELY, *supra* note 94, at 1.

[283] BORK, *supra* note 99, at 5. Bork argues for the same judiciary approach to statutory decision-making. *Id.*

[284] Scalia, *supra* note 98, at 23.

[285] *Id.* at 38. I say self-styled because there are some who question Justice Scalia's consistency in these matters. *See, e.g.*, Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994); Aviam Soifer, *Objects in Mirror are Closer Than They Appear*, 28 GA. L. REV. 533, 537 (1994).

[286] In the past, Justice Scalia has referred to himself as an "originalist." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

[287] BORK, *supra* note 99, at 5.

Both Scalia and Bork are much more restricted in what they find "in" the Constitution than the third approach to interpretivism, structural reasoning. I am referring here not to the work of Charles Black,[290] who might or might not be considered an interpretivist, but to that of John Hart Ely. Ely's approach to interpretation, representation-reinforcement,[291] is expressly premised on the "Nature of the United States Constitution."[292] I consider this approach interpretism,[293] even if interpretivists do not.[294]

Interpretivists, of course, would reject a constitutional right to a healthy environment because such a right would have to be derived through substantive due process, at least in part. The rejection of substantive due process, particularly as it relates to *Roe v. Wade*,[295] created the modern version of interpretivism.[296] As the court stated in *Tanner*, there is certainly no evidence that the framers of the Fourteenth Amendment—and surely no other framer—meant to protect the environment.[297]

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[288] Justice Scalia suggests as much in his section discussing legislative intent. *See* Scalia, *supra* note 98, at 16-18.

[289] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., concurring) (applying sovereign immunity "even where the parties did not fit the description of the Eleventh Amendment"); *see also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1642-44 (1996) (arguing Scalia's substantive agenda often trumps his textualist method). Actually, I do not understand how textualism can be presented by Justice Scalia as an interpretive approach at all. In his opinions in recent important structural cases, the text of the Constitution plays a small role. *See, e.g.,* Printz v. United States, 521 U.S. 898, 933 (1997) (striking down Brady Act); City of Boerne v. Flores, 521 U.S. 507, 537-39 (1997) (Scalia, J., concurring) (holding unconstitutional Religious Freedom Restoration Act). Fundamentally, *Printz* is a federalism case and *City of Boerne* is a separation-of-powers case. There is not much text there to be textual about.

[290] *See* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). Black's work is too flexible to be called interpretivist, but at least one author regards Black's structuralism as "text-bound." John B. McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 TUL. L. REV. 280, 307 (1984).

[291] *See* ELY, *supra* note 94, at 88.

[292] *Id.* at 88-101.

[293] *Id.* at 88. At times, it is even enough for Ely, who says, "[o]n my more expansive days . . . I am tempted to claim that the mode of review developed here represents the ultimate interpretivism." *Id.* at 87-88.

[294] Bork, *supra* note 276, at 390 (stating Ely "is a non-interpretivist whether he knows it or not").

Although this article does not attempt to debate the fundamentals of interpretivism, I would at least like to place the constitutional issue outside the issue of judicial "creation" of rights. The embarrassment from which interpretivism suffers has always been that the theory that the Constitution should be interpreted that way is not itself "in" the Constitution.[298] Interpretivism is based in part on a political idea concerning the proper role of judges. It criticizes non-interpretivism for giving judges in a democracy too much discretion.[299] The reason that judges would have broad discretion in non-interpretivism, however, lies in its view of morality. The underlying premise that rejects substantive due process goes beyond political theory to moral skepticism. As Bork has said, all constitutional theories based on substantive values or morality must end in nihilism because morality is undemonstrable.[300]

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[295] 410 U.S. 113 (1973).

[296] *See* Lupu, *supra* note 227, at 583.

[297] Tanner v. Armco Steel Corp., 340 F. Supp. 523, 536 (S.D. Tex. 1972).

[298] *See generally* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (arguing that historical analysis of Constitution rejects interpretivist approach).

[299] Richard A. Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 445 (1992).

[300] Bork, *supra* note 276, at 387-88. For an account that draws the link directly from the non-demonstrability of moral principles to an attack on *Roe v. Wade* to an attack on all substantive due process, see Grano, *supra* note 228, at 28-29. For a challenge to such moral skepticism in the context of the jurisprudence of Chief Justice Rehnquist, see HARRY V. JAFFA, "ORIGINAL INTENT AND JUSTICE REHNQUIST," *in* ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 83, 83-104 (1994). For a more general criticism, see Stephen Macedo, *Majority Power, Moral Skepticism, and the New Right's Constitution*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 111, 111-36 (James A. Dorn & Henry G.

Neither interpretivism's political idea nor its moral skepticism are to be found in the Constitution.

The right to a healthy environment is not subject to interpretivism's political or moral objections. I do not think this society, or humankind in general, is divided about whether humans should fundamentally alter the earth. We never took a vote to warm the climate, over-fish the seas, destroy habitats, extinguish species and all the rest of the sorrow litany. We stumbled into these problems as a result of sheer numbers and economic/social organization. We disagree about the facts—whether the climate is warming, for example—and about the remedies. However, the harm that may be coming is not itself a matter of political or moral dispute. The crisis of the environment is not like the death penalty or abortion.

The problem we face is that the current generation may prefer its own wealth and convenience over that of future generations. If we ask what the framers would have thought of that—not what they would have thought of environmental protection—I do not doubt the answer. John Adams was clear that the point of his involvement in government was to benefit his grandchildren.[301] I'm sure the other framers were of the same conviction.

3. *Economic Constitutional Theory*

Strictly speaking, economic constitutional theory refers to the public choice theory of government action, which treats government as a market for interest group transfers of wealth.[302] The implications of this perspective for constitutional interpretation are too depressing for me to write about. Fortunately, this perspective has not yet made much impact in constitutional jurisprudence.

More loosely, economic theory may be thought of as the effort to nudge the United States Supreme Court into reversing

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Manne eds. 1987).

[301] *See supra* note 6 and accompanying text.

[302] *See, e.g.*, Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 184-85 (1991).

the Post-New Deal consensus of aggressive protection of noneconomic liberties combined with little or no protection of economic liberties.[303] With one important exception, this effort has failed thus far. The Contract Clause[304] is still moribund. Substantive due process still omits economic issues.

The one exception is the Takings Clause.[305] *Dolan v. City of Tigard*[306] and *Lucas v. South Carolina Coastal Council*[307] indicated a new willingness on the Court's part to require compensation for government regulation that reduces property value[308] or requires expensive accommodation with environmental goals.[309] The Court seems poised to go even farther—much farther—under the Takings Clause, but has not yet acted. At least three Justices—Scalia, Thomas and O'Connor—seem ready to limit government use of Transferable Development Rights (TDR's) to avoid takings claims and perhaps overrule *Penn Central Transportation Co. v. New York City*.[310]

At first glance, a reinvigorated takings clause in particular and an economic perspective on the Court in general seem absolutely antithetical to constitutional recognition of environmental protection. Indeed, one author views *Lucas* as having begun the process of the rejection of the environmental paradigm and a return to common law/private property thinking on the Court.[311]

Actually, however, recognition of the serious danger we face, and what we are losing, would reinvigorate the harm principle as a restriction on private property. Right now, it is hard for the Justices to believe that beach-front homes and higher car emissions are really dangerous.[312] Obviously, before deriving a constitutional right to a healthy environment, judges would have to be convinced of the danger. But if they were convinced, the takings clause would not prevent widespread measures from affecting broad groups of citizens.

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[303] *See, e.g.*, RICHARD EPSTEIN, *in* ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 300.

[304] U.S. CONST. art. I, § 10, cl. 1 (stating "No State shall . . . pass any . . . Law impairing the Obligation of Contracts").

[305] U.S. CONST. amend. V (stating "[N]or shall private property be taken for public use, without just compensation").

[306] 512 U.S. 374 (1994).

[307] 505 U.S. 1003 (1992).

[308] *Lucas*, 505 U.S. at 1014-19.

[309] *Dolan*, 512 U.S. at 383-83.

[310] 438 U.S. 104 (1978). This prediction is based on Justice Scalia's concurrence in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 745-50 (1997) (Scalia, J., concurring).

[311] MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 129 (1996).

Economic theory actually enhances the likelihood that a constitutional right to a healthy environment will be recognized. Economic theory posits the self-interested citizen. Economics explains the otherwise inexplicable situation in which people might decide to enjoy their current prosperity at the expense of their own descendants. Ironically, economics explains why, if the future is to be protected, the protection must come, in part, from a relatively non-political agency like the courts. Assuming that the courts would hesitate to assume quite so large a role, economics at least suggests skepticism concerning the willingness of this generation to act in good faith in the current crises. It may turn out that the current generation is the first one to take economics seriously, and practice its methods, with disastrous, but rational, results.[313]

4. *Other Approaches to Constitutional Interpretation*

I lump other approaches together for two reasons. First, no other constitutional approaches are accorded the judicial recognition of the foregoing three. Second, other approaches do not pose serious impediments to the recognition of a constitutional right to a healthy environment. For example, natural rights are usually conceptualized as being derived from natural law.[314] It seems obvious that the right to an environment not permanently changed by man would be a reasonable candidate for protection in such a context. Similarly, the approach of balancing is also well adapted to a context in which not all interests are given appropriate weight by the political branches.[315]

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[312] *Id.* at 130 (calling such claims "convoluted").

[313] For an economic analysis of the environmental crises, see discussion *infra* Part V.

[314] *See, e.g.*, Caldwell, *supra* note 106, at 225 n.58.

The approach to constitutional interpretation best adapted to the recognition of a constitutional right to a healthy environment is that associated with John Rawls.[316] Edith Brown Weiss draws the obvious parallel that each generation is in a sense in Rawls's original position vis-a-vis the natural condition of the planet.[317] Justice would then require as much access to the "common patrimony" of earth as the prior generation enjoyed. We are not moving in that direction now.

I cannot even sketch the likely responses of other approaches to constitutional interpretation in terms of a constitutional environmental right. What of the Republican Revival,[318] with its strong emphasis on social relations? What of Ronald Dworkin's insistence that key constitutional provisions set forth "abstract principles" that can be meaningly developed over time?[319] And what of pragmatism, which allows the stretching of constitutional text "when there is a compelling practical case for intervention?"[320] I can imagine for all of them and other approaches as well, both support for, and opposition to, a constitutional right to a healthy environment.

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[315] T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984 (1987). Some scholars claim that balancing, a form of constitutional reasoning, has become a dominant theme in Supreme Court opinions over the last four decades. *Id.* at 943-44.

[316] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971). I am not sure there really is such a thing as Rawlsian constitutional interpretation. *But cf.* Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619 (1994) (discussing John Rawls's project in *Political Liberalism*); Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994). However, like Michael Zuckert, I see Rawls's influence throughout the field. Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?*, 11 CONST. COMMENT. 227, 227-80 (1994).

[317] WEISS, *supra* note 79, at 24.

[318] *See generally* Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

[319] RONALD H. DWORKIN, *in* A MATTER OF INTERPRETATION, at 122.

[320] POSNER, *supra* note 299, at 447. Posner does not call this pragmatism, but it is almost the same as what he did later call "The Pragmatic Approach." RICHARD A. POSNER, OVERCOMING LAW, 191-92 (1995).

In the end, of course, it is not academics, but judges who will decide the fate of the environment. Therefore, we must examine current case law in order to address a constitutional right to a healthy environment.

C. *Substantive Due Process in* Washington v. Glucksberg[321]

Substantive due process, despite criticism, retains its vitality. In fact, the United States Supreme Court's decision in *Glucksberg*, although refusing to recognize the physician-assisted right to suicide at issue in the case, amounted to a reendorsement of substantive due process itself.

The doctrine of substantive due process asserts that the Due Process Clauses of the Fifth and Fourteenth Amendments protect rights not protected by any other specific provision of the Constitution.[322] The genesis of substantive due process lay in state court cases,[323] most famously *Wynehamer v. People*.[324] *Wynehamer* held that a New York prohibition statute violated the state due process clause by forbidding the sale of liquor owned prior to the enactment of the prohibition statute.[325]

Although Robert Bork likes to blame substantive due process for beginning the Civil War,[326] through its use in *Dred Scott v. Sandford*,[327] substantive due process did not achieve full judicial recognition until *Allgeyer v. Louisiana* in 1897.[328]

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[321] 521 U.S. 702 (1997).

[322] *See* Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 195, n.55.

[323] *See* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 384-85, 460 (1911).

[324] Wynehamer v. People, 13 N.Y. 378 (N.Y. 1856).

[325] *Wynehamer*, 13 N.Y. at 378.

[326] BORK, *supra* note 99, at 28-34. As Richard Posner points out, substantive due process actually "played only a small role in [*Dred Scott*]." POSNER, *supra* note 299, at 440. Harry Jaffa maintains that Chief Justice Taney's opinion in *Dred Scott* represented an instance of original intent reasoning. JAFFA, *supra* note 300, at 15, 31.

[327] 60 U.S. (19 How.) 393, 450 (1856).

[328] 165 U.S. 578, 589 (1897) (striking down law forbidding effectuation of insurance contract entered into out-of-state).

Allgeyer introduced an era which became known by the case in which substantive due process came of age—the *Lochner* era.[329]

The primary characteristic of the Lochner Era was its use of substantive due process to protect what became known as economic liberty. The two apparent exceptions were *Meyer v. Nebraska*[330] and *Pierce v. Society of Sisters*.[331] The use of substantive due process to uphold economic liberty ended in 1937.[332]

During the next eighteen years, the Court consistently refused to give substantive content to the due process clause.[333] Nevertheless, by the time *Griswold v. Connecticut*[334] was decided in 1965, it appeared that the Court was granting substantive protection to non-economic, nonenumerated rights without using the words "substantive due process."[335] In any event, in 1973 the Court did rely once more on substantive due process in protecting a woman's liberty to abort a pregnancy in *Roe v. Wade.*[336] Since then, the Court has usually been willing to acknowledge the doctrine of substantive due process.[337]

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[329] Lochner v. New York, 198 U.S. 45, 64 (1905), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), and Ferguson v. Skrupa, 372 U.S. 726 (1963). The Court invalidated state legislation setting maximum working hours. *Lochner*, 198 U.S. at 64. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 21 (1993) (noting *Lochner* gave judges authority to second-guess legislative acts). Actually, most social/economic legislation challenged during the Lochner Era was upheld. *See* Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DEN. U. L. REV. 453, 453 (1998); Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?* 48 MERCER L. REV. 1049 (1997).

[330] 262 U.S. 390 (1923). The Court invalidated a state law forbidding grade schools from teaching in any language other than English. *Meyer*, 262 U.S. at 402-03.

[331] 268 U.S. 510 (1925). The Court struck down a prohibition on private schools. *Pierce*, 268 U.S. at 534-36.

[332] *See Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 79-81 (1937); LOCKHART, *supra* note 111, at 336-37. *Thompson* was actually a takings case. *Thompson*, 300 U.S. at 58-59.

[333] *See Ferguson*, 372 U.S. at 730.

[334] 381 U.S. 479 (1965). The Court overturned a ban on the use of contraceptives by married couples. *Griswold*, 381 U.S. at 485-86.

[335] *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

Roe v. Wade sparked a heated and continuing debate over whether substantive due process legitimately recognizes nonenumerated constitutional rights.[338] Although *Roe* itself was not overruled,[339] the rejection of substantive due process claims in *Bowers v. Hardwick*[340] and *Michael H. v. Gerald D.*[341] suggested that the doctrine of substantive due process might become a dead letter.

In retrospect, the case that appears to have changed the legal momentum was *Cruzan v. Missouri Department of Health.*[342] *Cruzan* actually upheld the State's requirement of clear and convincing evidence before the parents of a severely injured and incompetent adult child could force cessation of life sustaining treatment.[343] Subsequently, what became more significant than the holding was Chief Justice Rehnquist's careful statement about the right a competent adult would have in such a situation: "[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[344] By the time *Glucksberg* was decided, this assumption had become a strong suggestion[345] and *Cruzan* had become the resuscitation of substantive due process.

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[336] 410 U.S. 113 (1973), *modified by* Doe v. Bolton, 410 U.S. 179 (1973).

[337] *See, e.g.,* Youngberg v. Romeo, 457 U.S. 307, 324-25 (1982) (involuntarily committed, mentally retarded person has right to minimally adequate or reasonable training to safety and freedom from restraint); Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (invalidating limit on occupancy to single family, narrowly defined). *But see* Zablocki v. Redhail, 434 U.S. 374, 388-91 (1978) (striking down, on equal protection grounds, law forbidding marriage by resident under court support order with non-custodial children unless there is showing that children will be supported). Justice Stewart called the *Zablocki* decision "substantive due process by another name." *Zablocki*, 434 U.S. at 395.

[338] *See supra* notes 227-234 and accompanying text.

[339] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). A fragmented Court reaffirmed a woman's right to terminate a pregnancy but did not reaffirm *Roe*'s trimester framework. *Casey*, 505 U.S. at 878-79. For a discussion of the effect of *Casey*, see Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921 (1992).

[340] 478 U.S. 186 (1986). The Court upheld Georgia's criminal sodomy law. *Bowers*, 478 U.S. at 194-96.

[341] 491 U.S. 110 (1989). The Court held that the natural father had no right to a relationship with that child when the child was born into a viable marriage with another man. *Michael H.*, 491 U.S. at 122-28.

[342] 497 U.S. 261 (1990).

[343] *Cruzan*, 497 U.S. at 284.

Glucksberg, like *Cruzan*, actually denied recognition to the specific right raised in the case.[346] The Court held that the state ban on aiding suicide did not violate the Due Process Clause in the context of a patient request for assistance from a physician.[347] Nevertheless, *Glucksberg* sets forth, quite self-consciously, the proper methodology for raising a substantive due process claim.[348]

Chief Justice Rehnquist begins the majority opinion discussion with a clear endorsement of the idea of substantive due process: "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."[349]

Why did Justice Scalia join this language without a clarifying concurrence, such as the one he wrote in *Cruzan*?[350] Three factors make Justice Scalia's concurrence particularly telling. First, the majority opinion in *Glucksberg* strongly endorses substantive due process. Second, prior to the publication of the *Glucksberg* opinion, Justice Scalia gave speeches criticizing not only the right of assisted suicide, but, seemingly, his colleagues on the Court as well.[351] And third, Justice Scalia's new book takes on substantive due process directly.[352] All in all, Justice Scalia's silence sounds like that of a man who has given up. Perhaps the modern, conservative Supreme Court is ready to make peace with substantive due process.

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[344] *Id.* at 279.

[345] Washington v. Glucksberg, 521 U.S. 702 (1997). "We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

[346] *Glucksberg*, 521 U.S. at 705-07.

[347] *Id.*

[348] *Id.* at 719-21.

[349] *Id.*

[350] *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring). "While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field . . . ." *Id.* (Scalia, J., concurring). "The text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law.'" *Id.* (Scalia, J., concurring).

The *Glucksberg* opinion strengthened substantive due process in another sense—by clarifying the effect that substantive protection actually has. A question had been raised whether a finding of a protected liberty interest under the due process clause, as opposed to a fundamental right, would yield any review more searching than rational basis review.[353]

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[351] Justice Scalia's behavior before *Glucksberg* was decidedly odd for a sitting Supreme Court Justice. Here is a representative report, originally from *USA Today*, from the October 28, 1996 edition of the *Sacramento Bee*:

> It's absolutely plain there is no right to die, Scalia told a Catholic University audience in a little-noticed talk Oct. 18. "It doesn't belong in the Supreme Court as a constitutional question."
>
> The remarks have deeply disturbed right-to-die advocates and some judicial ethics experts say it was improper for him to reveal his views so strongly in advance of hearing the cases.
>
> "There was clearly understood not to be any federal right to die," Scalia said. He lamented the fact that a majority of the nine-justice court might create such a right.

Tony Mauro, *Scalia Jumps Gun On Right-to-Die Issue: No Such Thing, He Declares, as Court prepares to Review 2 cases, Sacramento Bee*, Oct. 28, 1996, at B8.

[352] SCALIA, *supra* note 98, at 24. "Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process." *Id.*

Justice Scalia wrote a lively concurrence in a recent substantive due process case, *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1723 (1998) (Scalia, J., concurring), but his objection was not to substantive due process per se, but only to suggestions in the majority opinion that he viewed as going beyond the analytical approach of *Glucksberg*: "Adhering to our decision in *Glucksberg*, rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert." *Lewis*, 118 S. Ct. at 1724.

Lewis held that deliberate or reckless indifference to human life is insufficient to establish a violation of substantive due process in the context of a high speed police chase aimed at apprehending a suspect. Only "a purpose to cause harm unrelated to the legitimate object of arrest" establishes a due process violation. *Id.* at 1711.

In terms of the Court's acceptance of substantive due process per se, Justice Kennedy's concurrence, joined by Justice O'Connor, attempts to close the door on general challenges: "It can no longer be controverted that due process has a substantive component as well." *Id.* at 1721. (Kennedy, J., concurring).

But *Glucksberg* makes clear that even protected liberty interests receive the sort of searching review that "place[s] a matter outside the arena of public debate and legislative action."[354] "[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"[355] The Chief Justice applies a rational basis review in *Glucksberg*, only after deciding that the asserted right is not a fundamental right, and effectively removes any doubts that protected interest language does not weaken substantive due process protection.[356]

What has not changed in the *Glucksberg* opinion is the Court's reluctance to actually find something to be a fundamental liberty interest and to apply rigorous substantive due process review. That reluctance is rooted in the very fact that such protection is so difficult for the political branches and the people to change once the Court has determined a liberty interest exists.[357]

In terms of specific method, the first requirement of substantive due process review is an examination of "our Nation's history, legal traditions, and practices."[358] While this review was said only to form the "backdrop" for evaluation of the constitutional claim in *Glucksberg*, the "almost universal tradition" opposing assisted suicide doomed the claim in *Glucksberg* itself.[359]

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[353] The Chief Justice's plurality opinion in *Webster v. Reproductive Health Services* originally raised the possibility of distinction between rights and interests. Webster v. Reproductive Health Servs., 492 U.S. 490, 520 (1989). *See* Marc Spindelman, *Are the Similarities Between a Woman's Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 U. MICH. J.L. REFORM, 775, 782-86 (1996). The *Cruzan* opinion repeated the distinction, and even the joint opinion in *Casey* avoided the language of fundamental rights. *Id.*

[354] *Glucksberg*, 521 U.S. at 720.

[355] *Id.* at 720-21 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (emphasis in original).

[356] *Id.* at 728.

[357] *Id.* at 720.

The "established method of substantive-due-process analysis" consists of two aspects: first, a finding that the claimed right or interest is "objectively, 'deeply rooted in this Nation's history and tradition'"[360] and, second, a "careful description" of the claimed interest.[361]

In *Glucksberg*, the right to assisted suicide failed both aspects of the substantive due process test. The universal and historically consistent prohibition of such assistance undermined the "traditions" part.[362]

The claim also failed the careful description aspect. What was significant in the description was not that the claimed right or interest was vague, but rather that a narrow statement of the assisted suicide interest took it outside the ambit of *Casey* and *Cruzan*.[363]

Glucksberg by no means promises an easing of the Court's unwillingness to find fundamental interests or rights protected by substantive due process. Substantive due process review, however, is not a sham in *Glucksberg*. The opinion provides the framework needed for the due process part of the constitutional right to a healthy environment. The remaining part of the claim sounds not in due process, but in equal protection.

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[358] *Id.* at 710.

[359] *Glucksberg*, 521 U.S. at 723.

[360] *Id.* at 720-21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). The opinion also quotes well-known language from *Palko v. Connecticut*, 302 U.S. 319 (1937). "'[I]mplicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 721 (quoting *Palko*, 302 U.S. at 325-26). It is not clear whether this last quote is meant to require some consideration of the role of the asserted interest in political life.

[361] *Id.*

[362] *Id.* at 723.

[363] *Id.* at 723-25.

D. *Equal Protection: The Requirement of Impartiality*

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[364]

The general rule of equal protection is that unless a legislative classification or distinction burdens a fundamental right or targets a suspect class, the law in question is entitled to a strong presumption of validity and will be sustained as long as it bears a rational relation to some legitimate government end.[365] It would be pure redundancy to suggest that equal protection is implicated in terms of environmental protection because the right to a healthy environment is itself a fundamental right. Obviously, that right would have to be independently established. Likewise, there are important issues of environmental justice concerning the ways in which current environmental policy does in fact burden suspect groups.[366] But that important issue is not germane in the context of a broad, environmental, constitutional right. So, the familiar approaches of equal protection do not apply to the right to a healthy environment in an obvious way.

However, equal protection requires more from a community than merely avoiding crude discrimination. The premise of this article is that the current generation is enjoying prosperity that cannot be, and will not be, sustained over future generations. Indeed, this generation is destroying the opportunity for future generations to enjoy the natural world as all previous humans have done. Of course, in actual constitutional litigation, that premise would have to be demonstrated. But, assuming the courts could be convinced that this is so, there would be a premise for raising equal protection claims.

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[364] Romer v. Evans, 517 U.S. 620, 633 (1996) (invalidating Colorado constitutional amendment precluding any government action designed to protect status of persons based on their sexual orientation).

[365] Vacco v. Quill, 521 U.S. 793, 799 (1997) (citations omitted).

[366] *See generally* ROBERT K. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 223 (1997) (describing and advocating environmental justice); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 395 (1991) (noting strong correlation between "race and the location of hazardous waste sites").

Frederick Schwartz has said that preserving the environment by deferring development that would benefit today's majority for the benefit of future generations is analogous to the constitutional principle of the protection of discrete and insular minorities and vulnerable individuals.[367] By definition, future generations do not vote. Thus, ensuring that elected representatives do not wholly sacrifice the legitimate interests of future generations may be thought of as akin to John Hart Ely's "representation-reinforcing orientation."[368]

I will take up below the question whether future generations are an appropriate object of judicial concern in our constitutional system. In terms of the equal protection doctrine, I need only show that *if* future generations are thought worthy of protection, they are owed a duty of impartiality.

A number of opinions state the impartiality principle.[369] In *Romer v. Evans* this principle had two aspects. One flaw in the state law was an inference that the Colorado anti-gay constitutional amendment was motivated by animosity. Government may not act out of a "bare . . . desire to harm a politically unpopular group."[370]

The principle of animus in equal protection was the basis for the holding in *Cleburne v. Cleburne Living Center, Inc.*,[371] that the denial of a special permit for the operation of a group home for the mentally retarded was unconstitutional because it rested on irrational prejudice against the mentally retarded.[372]

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[367] Schwartz, *supra* note 105, at 1293.

[368] ELY, *supra* note 94, at 101-02.

[369] *See* Lehr v. Robertson, 463 U.S. 248, 265 (1983) (stating that "[t]he concept of equal justice under law requires the State to govern impartially"); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (holding "fundamental principle" of equal protection is "the State must govern impartially"); Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (finding that "[t]he federal sovereign, like the States, must govern impartially"); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (arguing "[s]overeign's duty to govern impartially" is essence of equal protection); Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens J., concurring) (stating that "[t]he Equal Protection Clause requires every state to govern impartially").

[370] *Romer*, 517 U.S. at 634 (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

This understanding of the animus principle of equal protection is not at issue in regard to a right in future generations to a healthy environment. The current generation is not motivated by a desire to harm its descendants. We are selfish, not monstrous.

It has been argued that the animus principle, properly understood, goes beyond motivation to prohibiting action that is simply "grounded in or reflective of the view that some citizens have less value as persons than others."[373] This view of unconstitutional animus is closer to the situation we are in today, since the current generation is willing to place burdens on future citizens it would not be willing to accept for itself.

The other aspect of non-impartiality in *Romer* was the effect of the constitutional amendment at issue of making it more difficult for one group of citizens than all others "to seek aid from the government."[374] Today's environmental policies, which apparently accept the likelihood of permanent, irreversible change to the environment that will greatly harm future generations, impair access to government by future generations in two senses. First, the simple indifference to the needs of the future evidenced by the current generation is itself an insurmountable barrier today. Future citizens can only have access to government metaphorically, to the extent that the citizens of today act in the interests of the future. To the extent a current generation refuses to do this, the Court may legitimately act to redress the imbalance.

The second way today's policies are making it more difficult for future generations to seek aid from government is the permanent change in the earth we are now causing. Because the environmental crises may prove irreversible, today may be "A Special Moment in History."[375] If the needs of the future are ignored today, the matter may be final and there will be, in effect, no access to remedial action in the future. In other words, no access to government will be relevant later if the interests of future generations are irretrievably sacrificed now.

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[371] 473 U.S. 432 (1985).

[372] *Cleburne*, 473 U.S. at 450.

[373] *See* Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 499 (1997).

[374] *Romer*, 517 U.S. at 633.

The Court has acted in the past to redress permanent distinctions made by law among the citizens of a state.[376] Such distinctions are actually rarely made because the disadvantaged group also votes. But if a majority demonstrably made policy on the premise that the interests on one part of the community did not count, or did not count very much, there is no question that the Court would find such behavior illegitimate. Insofar as it can be shown that we are pursuing just such a path in regard to our own descendants, the Court should be willing to find a violation of equal protection.

PART IV—THE APPLICATION OF SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION TO THE RIGHT TO A HEALTHY ENVIRONMENT

What follows is not intended as a brief. As I readily admit,[377] the time is not now ripe for the recognition of a right to a healthy environment. It is enough for now to see that there are no doctrinal or other impediments to the recognition of such a right. Since due process and equal protection contain disparate elements, it is easier to view them separately.

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[375] *See* McKibben, *supra* note 8.

[376] *See* Attorney General v. Soto-Lopez, 476 U.S. 898, 911-12 (1986) (striking down statute giving preference to veterans applying for civil service jobs if they were New York residents at time of entering military); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 624 (1985) (invalidating tax exemption given only to Vietnam veterans who were New Mexico residents before May, 1976); Zobel v. Williams, 457 U.S. 55, 65 (1982) (declaring statute requiring certain length of residence as basis for distribution of state revenue unconstitutional).

[377] *See supra* notes 104-14 and accompanying text.

A. Substantive Due Process and the Right to a Healthy Environment

Glucksberg prescribes that substantive due process analysis begin with history, legal traditions and practices.[378] In a general sense, the right to a healthy environment is deeply rooted in all three. As I have shown throughout this article, protection of the environment is well established in American life. In terms of our history, at least since Frederick Jackson Turner announced the end of the American frontier in 1893,[379] we have had a sense of environmental limit. In terms of legal tradition, the enormous body of environmental regulation, state constitutional environmental provisions and common law restrictions reinforce a right to environmental protection. Our practices are largely consistent with history and our laws. No citizen would think there is a right to pollute the air or land of his or her neighbor.

But putting the matter at such a high level of generality ignores *Glucksberg*'s insistence that substantive due process requires a "careful description" of the right at issue.[380] For it is also the case that every court that has confronted the issue directly has found that there is no constitutional right to a healthy environment.[381] In fact, traditionally, American society has viewed property rights as absolute, allowing owners to use their property as they choose, whatever effect on the environment their actions may have.[382]

It is possible, given this tension, that the right to a healthy environment will ultimately be treated like the right to education. Though education is widely guaranteed, the Court refused in *San Antonio Independent School District v. Rodriguez*[383] to recognize education as a fundamental right. On the other hand, when the denial of education appeared serious enough, the Court did not treat education as "merely some government benefit" either.[384] It may be, then, that the right to a healthy environment will not achieve constitutional status until the Court becomes convinced both that the environmental dangers are real and that the political branches are failing to act responsibly, despite their pro-environmental rhetoric.

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[378] *See supra* Part III C.

[379] *See* John Rohe, *A Bicentennial Malthusian Essay*, 77 MICH. BUS. L.J. 63, 64 (1997).

[380] *Glucksberg*, 521 U.S. at 720-21.

[381] *See supra* notes 188-204 and accompanying text.

[382] *See generally* Herman Boltz, *Property and Liberty Reconsidered*, 45 VAND. L. REV. 1015 (1992) (reviewing JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (1972)).

[383] 411 U.S. 1 (1973).

In anticipation of that day, is it possible now to carefully delineate the right to a healthy environment in order to consider its role in history, tradition and practice? Unfortunately, the answer is a qualified no. The right to a healthy environment is the right of each individual to live in a natural world—a world that has not been unalterably changed by man. The impact of humankind on the natural world today is something that has no parallel in history.[385]

Therefore, our usual legal categories are outdated in terms of the right to a healthy environment. The concept of causation of harm, for example, is stretched when looking at human activity in the aggregate. If a particular person were to raise the temperature on my land maliciously, of course that person would be liable. But if the activities of all people, including my own activities, have caused that result, what party or parties would be liable?

There is also the problem of the natural baseline. Insofar as I have a right against permanent human interference with the global environment, I must have a sense of what that environment would be like without such interference. This problem can perhaps be solved by the use of historic averages for weather, ozone, or whatever aspect of the environment is at issue. But that resolution certainly is not simple.

One additional difficulty in evaluating the right to a healthy environment has been added recently. Because of the severe danger to human life from global warming, there are now calls for geoengineering—intentional human intervention to change the earth's climate—in this case, to cool it to forestall disaster.[386] An action of that sort would be a direct infringement of the right to a healthy environment. Furthermore, some experts doubt the possible success of geoengineering.[387]

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[384] Plyler v. Doe, 457 U.S. 202, 221 (1982) (holding denial of free public education to children of illegal aliens violates equal protection).

[385] *See* McKibben, *supra* note 8, at 47-49.

All of the foregoing counsels caution in the recognition of a right to a healthy environment. But it does not require denial of the right. A preliminary attempt should therefore be made to apply the categories of *Glucksberg*, in order to see whether substantive due process might provide a premise for a right to a healthy environment.

Glucksberg actually used two general descriptions of due process methodology. One approach was that of history. The Court also referred to what I think of as an older tradition. The Court quoted *Palko v. Connecticut*'s[388] definition of fundamental rights: "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[389]

The Court may well have meant nothing by this quotation from *Palko*. The quoted language suggests just the sort of substantive evaluation of a right that the Court studiously avoided in its objective listing of aspects of history, legal traditions and practices. For example, the Court referred to the same *Palko* quote in *Bowers v. Hardwick*[390] without evaluating the nature of sexual choice in a free society and whether "liberty [or] justice would exist if [it] were sacrificed."[391]

Nevertheless, the *Palko* language is suggestive. What sort of right renders liberty and justice unobtainable if it is sacrificed? One obvious answer is a right of material need. For example, how can someone enjoy liberty if he or she is starving?

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[386] *See* Michaelson, *supra* note 7, at 77.

[387] We are subject to technological hubris. *See* AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 206 (1992). Senator Gore is critical of the belief that technological advances can remedy the adverse ecological effects on the earth. *Id.*

[388] 302 U.S. 319 (1937).

[389] *Glucksberg*, 521 U.S. at 720 (quoting *Palko*, 302 U.S. at 325).

[390] 478 U.S. 186 (1986).

[391] *Bowers*, 478 U.S. at 191-92. In other words, the Court's "analysis suggested that it did not regard the *Palko* test as adding anything" to substantive due process methodology. Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 227 n.74 (1987).

But we may also regard this language as concerned more with the effect of denial of the right on society as a whole, rather than just the effect on particular individuals. If free speech, or the free exercise of religion or freedom from unreasonable searches and seizures were denied, arguably society as a whole could not sustain anything resembling liberty or justice.

How does this approach apply to the right to a healthy environment? The only thinkers who have considered what the world would be like if the environmental crises were to come to pass have been writers of science fiction novel. Books like Robert Silverberg's *Hot Sky At Midnight*[392] describe what a world of constant and chronic environmental disaster is like.[393] It is not a world of political liberty or concern about freedom. If the Court decides in the future to take *Palko* seriously, the right to a healthy environment may fit doctrinal requirements very well.

For the moment, though, the Court applies "history, legal traditions and practices as the substantive due process test."[394] It is hard to gauge the history of the right to a healthy environment when the earliest attempt to undermine it may have been the Tower of Babel.[395] Does that mean the right is established in history? It is hard to list our practices when the "practice" is to understand a distinction between what is natural and what is man-made. All of our social and economic arrangements assume that the climate will be more or less dependable, at least over the long run.[396] That way of looking at things practically defines us.

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[392] ROBERT SILVERBERG, HOT SKY AT MIDNIGHT (1994).

[393] *Id.* at 12-26.

[394] *Glucksberg*, 521 U.S. at 710.

[395] Genesis 11: 1-9. "[A]nd this is only the beginning of what they will do; and nothing that they propose to do will now be impossible for them." *Genesis* 11:6. I realize that humankind is not today striving to change the environment as much as it is doing so accidentally. Nevertheless, we know, or ought to know, the consequences of our actions by now and, yet, we have not changed the way we live.

[396] The changes we are making, however, promise greater instability in the

In other words, the right to a healthy environment is so deeply embedded in human experience as to be somewhat invisible. For example, law, as a human institution, is dependent on and assumes to the same degree as do all other human institutions, the continuing existence of a healthy—that is, reliable and generally supportive—environment. That relationship of humans to nature can be seen in small relief in the Act of God tort doctrine.[397] The Act of God doctrine provides that "[n]egligence cannot be predicated upon a failure to anticipate that which was so extraordinary and utterly unprecedented as to have eluded the foresight of a reasonable man."[398] The point of the Act of God defense is not that the damaging act was caused by natural forces, but that the cause of the harm was an event "so extreme that history of climatic variations and other conditions in particular locality affords no reasonable warning of [it]."[399] Of course, many natural disasters may be considered highly foreseeable and, like building in a flood plain, eventually inevitable.[400] Harm in such a situation is not considered an act of God.[401]

The Act of God doctrine illustrates the legal assumptions about the relationship of people to nature. In general, nature is viewed as predictable and, even if occasionally harmful, basically beneficial. For this reason, a defendant is generally liable for failing to anticipate the familiar, occasionally harmful acts of nature, assuming one owes a duty to the injured party.

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future, even if not all changes will be harmful. *See* McKibben, *supra* note 8, at 97-99.

[397] For a discussion of the Act of God doctrine, its general application to tort and contractual liability, see 1 AM. JUR. 2D *Act of God*, §§ 1 et seq. The Act of God doctrine is now applied outside the common law context that gave it birth. *See, e.g.*, Anthony J. Fejfar, *Landowner-Lessor Liability Under CERCLA*, 53 MD. L. REV. 157 (1994).

[398] Curtis v. Dewey, 475 P.2d 808, 810 (Idaho 1970) (holding that question of landowner's negligence should have been submitted to jury).

[399] 57 AM. JUR. 2D *Negligence*, § 710 n.17 (1989).

[400] Denis Binder, *Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 51-52 (1996).

[401] *Id.*

Thus, an electric utility company can be held liable for damage caused by lightning striking an electrical transformer because such an event is fairly frequent and thus foreseeable.[402] On the other hand, damage occasioned by a storm of unprecedented intensity is not foreseeable and, therefore, is deemed an act of God for which no one is responsible.[403]

The point here is not whether the Act of God doctrine represents sound policy.[404] Rather, the issue is whether the right to a healthy environment is objectively rooted in our legal traditions. A doctrine like the Act of God cannot be applied when storms of the century suddenly become routine.[405] The Act of God doctrine thus shows the assumption of a healthy environment.

Some may think that people and legal doctrines can simply adapt to warmer, stormier weather, or whatever else nature brings by way of response to human influence. But the fact is, we do not know what the environment will be like in the future. We just know that it will be different. Although God may not play dice with the universe, man is now doing exactly that.

This new uncertainty is the genesis of the due process right to a healthy environment. Humankind is busy conducting a gigantic experiment with the planet. The question is not by what right the Constitution and the courts would help stop or slow the experiment, but by what right I was made a part of the experiment in the first place. Of course, I also realize that one nation cannot by itself stop the experiment. But this country is the single greatest contributor to the danger and the single biggest barrier to doing something about it.[406]

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[402] Ransome v. Wisconsin Elec. Power Co., 275 N.W.2d 641, 650 (Wis. 1979) (holding Act of God defense not available to power company when lightning started fire in consumer's home).

[403] *See, e.g.,* Bratton v. Rudnick, 186 N.E. 669, 671 (Mass. 1933) (finding defendant not liable for collapse of dam because rain that led to collapse was "twice as great as any disclosed by easily available records").

[404] The defendant in *Bratton*, for example, maintained the dam negligently. *Bratton*, 186 N.E. at 671.

[405] *See* McKibben, *supra* note 8, at 68:

> Engineers designing storm sewers, bridges, and culverts used to plan for what they called the "hundred-year storm." That is, they built to withstand the worst flooding or wind that history led them to expect in the course of a century. Since that history no longer applies, [Thomas Karl, of the National Oceanic and Atmospheric Administration] says, "there isn't really a hundred year event anymore . . . we seem to be getting these storms of the century every couple of years." When Grand Forks, North Dakota, disappeared beneath the Red River in the spring of last year, some meteorologists referred to it as "a 500-year flood"—meaning, essentially, that all bets are off. Meaning that these aren't acts of God.

Id.

What to do about the experiment, however, raises the issue of what the right to a healthy environment would actually entail. Substantive due process requires careful description of the right. In the instance of the right to a healthy environment, the question is, what would the right mean in court?

One possible answer is nothing. As stated above, constitutional rights are conceivable without courts enforcing them.[407] In fact we have such rights in the Constitution now.[408]

But, in general, constitutionalism without courts still requires that people be able to imagine what a right would mean in practice. The relationship between the National Rifle Association and the Second Amendment illustrates this principle. Courts do not agree with the NRA's interpretation of the Second Amendment, but no one doubts the NRA's belief in the right to bear arms. So it is necessary, even if there is to be no judicial application, to give a careful description of the right to a healthy environment.

One meaning of the right to a healthy environment is that other rights should be viewed within an environmental perspective. That is, the right to a healthy environment would interject environmental concerns into contexts in which the Court had previously raised other sorts of concerns. This effect would be particularly pronounced in regard to the Takings Clause and the doctrine of standing.

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[406] "The world's leading emitter [of global carbon emissions] is the United States, with 23 percent of the total." WORLDWIDE INSTITUTION, VITAL SIGNS 1998 66. It was the United States that fought more stringent reduction goals at Kyoto. *See* Peter B. Lord, *Chafee Pessimistic on Global Warming Treaty*, PROVIDENCE J.-BUL., Dec. 10, 1997. Yet it is the United States, the world's leading problem, that hypocritically insists that it will not ratify even the Kyoto Accord unless developing nations are included. *See* James Gerstanberg, *U.S. Senate Is Cold to Warming Treaty*, AUSTIN AM.-STATESMAN, Dec. 12, 1997, at A6.

[407] *See supra* notes 205-23 and accompanying text.

[408] *See* U.S. CONST., art. I, § 9 ("No Title of Nobility shall be granted by the United States."); U.S. CONST., art. 1 § 10 ("No State shall . . . grant any title of Nobility.").

There is already in American law a general belief that the Takings Clause prohibits a total restriction on land development.[409] Though that is clearly an overstatement,[410] there is no question that the Court is reviewing land use regulation more stringently under the Takings Clause today than was the case twenty years ago.[411]

Still, it would be simple for a future Court to cut back on the current reach of the Takings Clause. For one thing, the recent expansion of the Takings Clause has not been justified, and perhaps could not be justified, on textualist or originalist grounds.[412] For another, the Court has always kept a sort of escape clause limiting the reach of takings, through the harm principle. All that would be needed in construing requirements like "rough proportionality" in *Dolan*,[413] for example, is a realistic estimation of what development really costs, both immediately in the local area and in the long run in the nation and to the planet. The same is true of the "pre-existing limitation upon the landowner's title" that was said in *Lucas* to justify even a permanent easement upon private property without compensation.[414]

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[409] "The takings issue has become a constitutional obstacle to barring development on environmental grounds." Binder, *supra* note 400, at 55, n.239 (citing Dolan v. City of Tagard, 512 U.S. 374, 383-87 (1994) (holding that city's requirement that landowner dedicate portion of property lying within floodplain as public greenway violated requirements of Fifth Amendment); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992) (holding that prohibition of new construction or replacement of destroyed buildings in dead zone, twenty feet back from first row of dunes could constitute taking); Nollan v. California Coastal Comm'n, 483 U.S. 825, 841-42 (1987) (holding that Takings Clause prevents California Coastal Commission from compelling coastal residents to comply with state environmental program)).

[410] For example, the restriction in *Lucas* was analyzed by the Court as if it barred all "economically beneficial or productive use" of the land, which is certainly not true of most environmental regulation. *Lucas*, 505 U.S. at 1015. Nor was the harm purportedly avoided in *Lucas* imminent, or even clearly demonstrated. *Id.*

[411] *See* James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377, 382 (1997) ("[A] few federal court decisions . . . have breathed new life into the Fifth Amendment Takings Clause."); Steven R. Shapiro, *The Center Holds, But Where Is the Center? A Response to James Simon*, 40 N.Y.L. SCH. L. REV. 935, 942 (1996) ("[T]he present Court has breathed new life into the Takings Clause.").

[412] *See* Gerhardt, *supra* note 285, at 62-65; *see also* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. AND MARY L. REV. 1099, 1136 (1997) (stating that modern land use law is erected upon proposition that providing benefit can cure harm of eminent domain

We are used to thinking of private development as something that basically affects only the individual landowner and perhaps the immediate area. We will have to learn that local development decisions have incremental but massive overall effects. Every time a shopping center is built, forest is destroyed. Forests "are vital in the future battle to save the climate because they store about eighty per cent of the above-ground and forty per cent of the below-ground carbon, which would otherwise be floating around in the atmosphere as carbon dioxide, and making the earth heat up even faster than it is already."[415] I do not mean that all development must be stopped. But when a landowner demands compensation for denial of the right to develop, the Court must look to all the costs development entails.

This is not a threat to anything worth calling liberty. Commerce clause jurisprudence already teaches that incremental harms may be aggregated in considering the legitimacy of gov-

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use).

Robert Bork criticizes Richard Epstein's anti-redistributionist interpretation of the Takings Clause, but does not discuss the theory of regulatory takings itself. BORK, *supra* note 99, at 229-30. Paul Finkelman has suggested that Bork might not care for the results if he were to do so. Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 358 n.39 (1989).

[413] *Dolan*, 512 U.S. at 391. "[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* This is what the Court describes as "rough proportionality." *Id.*

[414] *Lucas*, 505 U.S. at 1028-29.

[415] BROWN, *supra* note 25, at 118.

ernment authority.[416] Whether the environmental harms from development are real is something of which the courts will have to be convinced. But if the courts are convinced, small costs that add up to large damage need not be ignored.

Ironically, if the environmental crises become manifest and force land use restrictions to become more widespread, it will be easier to convince the courts that compensation need not be paid for government regulation. A consistent theme in takings jurisprudence is the intent "to ensure that the political majority does not make use of its position to rob minorities of their interests through the exercise of raw power."[417] The greater and more widespread the harm, therefore, the more allowance there will be for widespread regulation.

The same, new understanding of environmental harm could influence the Court in regard to standing. It is no accident that an important limit on standing was pronounced by the Court in *Lujan v. Defenders of Wildlife*,[418] an environmental case involving a broad citizen suit provision.[419] No doubt new laws attempting to protect us from global warming and other harms will also contain broad citizen standing provisions. Right now, such provisions seem vulnerable. But, as in the case of takings, if the Court in *Lujan* had been convinced that the extinction of species of animals is really imminently harmful to everyone, the decision might well have gone the other way.[420]

As I am writing this article, we are suffering what may become another in a string of record setting hot summers. Insofar as people faraway contribute to global warming, I am feeling quite concretely affected. It would be ludicrous to hold in the environmental field, the equivalent of the Court's statement in *Allen v. Wright*[421]—in the context of racial stigma—that a "black person in Hawaii" could not challenge a racially discriminatory act in Maine.[422] Carbon emissions in Maine do affect the weather in Hawaii, whether racial discrimination does or not.

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[416] *See* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding congressional regulation of home grown wheat because of effect of all such wheat on interstate market).

[417] Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1092 (1990).

[418] 504 U.S. 555 (1992).

[419] *Lujan*, 504 U.S. at 557. *Lujan* involved an attempt by the plaintiffs to enforce provisions of the Endangered Species Act of 1973. *Id.*

[420] *Id.* at 572 (stating that this is not "a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations").

All of these are ultimately matters of fact and judgment. I am not suggesting that the Court should act immediately. I am only suggesting that if an environmentally sensitive Court were convinced of the scope of environmental harm, it could react to the harm within traditional judicial categories.

The next possible area in which a court might act pursuant to a right to a healthy environment is the balancing test of *Payne v. Kassab* discussed above.[423] Under a *Payne*-like right of review, any time the government were to act in a way that might negatively affect the environment, a court would be willing, theoretically, to decide whether the contribution of the act to human alteration of the natural world was so great that the government action would be enjoined.

There is no reason to imagine that a *Payne*-like review would change legal practice very much even if the courts were willing to carry it out. *Payne*, after all, has had little impact in its native Pennsylvania.[424] But the mere existence of such judicial review would help to change public and congressional attitudes toward the environment. Congress now feels free, for example, to exempt certain projects from the requirements of the National Environmental Policy Act.[425] If there were a chance that a court might block the project anyway, Congress might hesitate to grant such exceptions in the future. Similarly, environmental impact statements for proposed legislation sometimes appear to be required.[426] But this requirement has proved difficult to enforce.[427] The *Payne* test, conversely, would apply in a clear way to any government action or regulation, albeit after enactment. Even subsidies of environmentally harmful activities, like highway projects, would be subject to court challenge and judicial environmental evaluation.[428]

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[421] 468 U.S. 737 (1984).

[422] *Allen*, 468 U.S. at 756.

[423] *See supra* notes 130-38 and accompanying text.

[424] *See supra* notes 130-34 and accompanying text.

[425] *See* Caldwell, *supra* note 106, at 205 n.9. As of 1997, Congress had granted twenty-eight such exceptions. *Id.*

[426] 42 U.S.C. § 4332(2)(C) (1994) (requiring preparation of EIS for "every rec-

I realize that accepting such broad judicial review will be troublesome, even for someone sympathetic to environmental concerns. After all, anyone could sue under such an environmental right, and the right could become a pretext for litigation aimed merely at slowing down government action with which some particular group does not agree. We might end up with not only government by the judiciary, but government by deadlock.

Having seen the Pennsylvania experience with *Payne*-review at first hand, this does not seem a likely outcome to me. Instead, the courts are likely to impose high threshold requirements. The burden of proof and of going forward will be on the plaintiffs, for example. Even more important, plaintiffs would not necessarily be entitled to temporary injunctive relief during environmental litigation. Government need not be stymied by actions of mere harassment. Nevertheless, concern about judicial power under the right to a healthy environment is quite legitimate.

Additionally, the right to a healthy environment is not necessarily limited to actions of government. An important issue that would arise under such a right is the State Action doctrine.[429] Most of the actions in the world that threaten the environment are the result of private rather than public activi-

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ommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment").

[427] *See* Silvia L. Serpe, *Reviewability of Environmental Impact Statements on Legislative Proposals After* Franklin v. Massachusetts, 80 CORNELL L. REV. 413, 417 (1995) (stating that "based on the EIS, courts cannot stop an agency from proceeding with its project").

[428] *See* Caldwell, *supra* note 106, at 215.

[429] *See generally* Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757 (1979) (discussing application of constitutional rights to prevention of private actions).

ty. Would the constitutional right to a healthy environment encompass a challenge to private action?[430]

Substantive due process, if really linked to the text of the Due Process Clause, would contain a state action requirement. But how close is the link, really, between substantive due process and the due process clause?

The prospect of a judicially derived right to review the acts of any private party that could be brought by anyone, may convince people that a constitutional right to a healthy environment is medicine far worse than any disease could possibly be. But then, the disease we are about to see may be worse than any we have ever seen before. The right to a healthy environment contains tremendous dangers to a free society. The dangers are obvious. What has not been obvious so far is the environmental danger we are facing right now, but refuse to acknowledge.

The constitutional right to a healthy environment cannot by itself protect us. It cannot force negotiation of meaningful international agreements, nor require their ratification. It cannot impose significant carbon or gasoline taxes, which are so badly needed.

However, a right to a healthy environment can point us in a direction and remind people of the risks we are exposing ourselves to. And it can do one more thing. The right to a healthy environment can put the law on the side of a human birthright, rather than on the side of those who threaten that birthright.

B. Equal Protection and the Right to a Healthy Environment in our Posterity

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Pos-

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[430] *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974) (discussing ability to use constitutional rights to prevent private actions).

> terity, do ordain and establish this Constitution for the United States of America.[431]

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[:] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[432]

There are two issues to confront in deciding whether equal protection is violated by the denial of a healthy environment to future generations. The first question is whether future generations are protected by the Constitution at all. The second question is whether, in terms of the environment, future generations can be considered a "discrete and insular minority"[433] needing special protection by the courts.

Are future generations protected by the Constitution? In constitutional history, the issue of who is to be considered part of the political community for purposes of constitutional rights has always been controversial. The advent of the Civil War was certainly accelerated by the decision of that question in *Dred Scott*.[434] The issue of membership in the political community has arisen in law in regard to protection of the natural world.[435] Of course, *Roe v. Wade* raised the issue whether the fetus is a person—that is a member of the political community—under the Fourteenth Amendment.[436]

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[431] U.S. CONST. preamble.

[432] United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (citations omitted).

[433] Carolene Prods. Co., 304 U.S. at 152-53 n.4.

[434] Dred Scott v. Sandford, 60 U.S. (1 How.) 393, 454 (1857) (holding circuit court could not have diversity jurisdiction in suit brought by freed slave because slave could not be United States citizen).

[435] *See* STONE, *supra* note 86; William D. Araiza, *Democracy, Distrust, and the*

I am not sure what approach the Court would use in regard to constitutional protection for future generations. If the Court were to ask Justice Blackmun's question in *Roe*—was the word "person" understood as including future generations[437]—the answer would be no. Furthermore, there would be something ludicrous about recognizing the rights of generations unborn, but not recognizing any rights in an unborn being already in existence.[438]

However, since this article is not about abortion rights, we can suppose that *Roe* will not come up when the separate question of the environmental right of future generations is considered by the Court. As discussed above, the interpretive methods in widest use right now are textualism and originalism.[439] So, the issue may be phrased as follows: are future generations protected in the text or the original understanding of the Constitution?

The Preamble to the Constitution[440] and the quote attributed to John Adams above,[441] suggest that the founders were thinking about future generations as beneficiaries of the Constitution in some sense. That does not tell us that they

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Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value, 45 UCLA L. REV. 385, 407 (1997) (asking, "[A]re Public Trust Resources Analogous to Suspect Classes?" and answering no).

[436] Roe v. Wade, 410 U.S. 113, 158 (1973) (holding, inter alia, that fetus is not "person" for purposes of due process. "All this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

[437] *Roe*, 410 U.S. at 158.

[438] *See* James Joseph Lynch, Jr., *Posterity: A Constitutional Peg for the Unborn*, 40 AM. J. JURIS. 401, 402 (1995) (stating that, "[a]t common law, certain members of future generations, fetuses, were a life in being for the purposes of the Rule Against Perpetuities").

[439] *See supra* notes 281-301 and accompanying text.

[440] U.S. CONST. preamble (stating that constitution was established to "secure the Blessings of Liberty to ourselves and our Posterity").

[441] *See supra* note 6 and accompanying text.

thought, or provided in the text, that future generations had rights or that someone could sue in court on their behalf. However, those issues could not have arisen in the creation of the Constitution, given that judicial review itself hardly came up. In any event, it would not do violence to text and intent to recognize future generations as protected by the Constitution.[442]

A related method of constitutional interpretation is to look at the structure of the Constitution as a whole, as John Ely does.[443] Here, we may say with confidence that future generations should be considered protected by the Constitution, because they are certainly bound by it. The Constitution has been called "a kind of intergenerational deal we make with ourselves," under which "extraordinary majorities of the past have the power to trump contemporary majorities."[444] In fact, it was this intergenerational control through the Constitution that Jefferson, at least for a time, protested.[445] We have never resolved in an entirely satisfactory way just why some particular past groups—hardly even majorities by our lights—should control political life today.[446] But since they do, those future generations that find themselves part of the "deal" ought to get something out of it.

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[442] *See generally* R. George Wright, *The Interests of Posterity in the Constitutional Scheme*, 59 U. CIN. L. REV. 113 (1990) (discussing rights of future generations under Equal Protection Clause).

[443] *See supra* notes 291-94 and accompanying text.

[444] Richard E. Morgan, Comment, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 139, 142 (1987).

[445] Letter from Thomas Jefferson to James Madison, *supra* note 231. "[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation." *Id.*

[446] *See* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1915 (1995) ("Originalist theories of constitutional interpretation are beset by the dead hand problem. No originalist thinker of whom I am aware has convincingly explained why the present generation should be ruled from the grave."); *see also* Donald J. Boudreaux & A. C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 125 n.52 (1993) (contrasting democratic theory of binding Constitution with economic theory); James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 44 (1991) (discussing why "originalism . . . does not succeed in justifying . . . its widely heralded conclusions that courts should never update the constitutional text to conform to current norms").

That kind of contract-sounding language—third party beneficiaries and consideration and so forth—is one way to think of the rights of future generations under the Constitution. But a more meaningful way to think about this, especially since the framers no doubt thought that being bound by the Constitution was beneficial for future generations,[447] is to treat the Constitution as an intra-family relationship. Paul Kahn, for example, has written that "[t]o participate in constitutional governance is to participate in an intergenerational project."[448] Future generations are not just bound by the past, they participate in the extension of the past. Future generations will become, so to speak, the past that binds even more remote generations. We are an ongoing family.

Are future generations ordinarily protected by their place in a family structure? I suppose they are not legally protected; thus, in the absence of a trust, or similar instrument, any one generation is legally free to squander resources painfully built up over generations. No later generation could sue to get such resources back. Nor could any current family member sue on their behalf to prevent such alienation.

However, it would not be wrong, nor incoherent, nor out of keeping with the structure of a family, to permit such intergenerational intervention. That is just what we could do under our Constitution. We could recognize rights in future generations.

If we were to borrow the method of substantive due process from *Glucksberg*, history, legal traditions and practices,[449] we would have additional justification for recognizing rights, particularly environmental and constitutional rights, in future generations. State constitutions refer to the obligation to protect the environment for future generations,[450] as do a number of federal environmental statutes.[451] American political rhetoric as well is oriented to the protection of future generations.[452]

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[447] Actually, there is dispute over just who the framers of constitutional provisions primarily thought of themselves as binding—themselves or the future. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997) (stating that "cross-temporal entrenchment . . . is inconsistent with the democratic principle that present majorities rule themselves").

[448] PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 4 (1992).

[449] *See supra* notes 354-63 and accompanying text.

Although American law, especially constitutional law, is embarrassingly parochial and nationalist, I will add here that the international commitment to protecting the environmental rights of future generations is very pronounced.[453] Unfortunately, it may be that *Glucksberg*, and the legal tradition from which it came, has little interest in that fact.

Assuming that future generations are part "of the entire community" that Justice Stevens wrote in *Karcher* that the State "must serve the interests of,"[454] are they a "discrete and insular minority"[455] that the Court must give special protection and recognition to? In other words, assuming that they are protected at all, should the Court searchingly review current environmental practices in the name of equal protection of future generations?

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[450] *See* PA. CONST. art. I, § 27 ("Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.").

[451] Raymond A. Just, Comment, *Intergenerational Standing under the Endangered Species Act: Giving Back the Right to Biodiversity after* Lujan v. Defenders of Wildlife, 71 TUL L. REV. 597, 615 (1996) (citing examples).

[452] Here is a very typical example, from August 21, 1996, 1997 Federal Document Clearing House, Federal Department and Agency documents, SLIC-Major-Group 06-Transportation, *available in* 1996 WL 477349.

> U.S. Secretary of Transportation Federico Pena today announced the award of $60.3 million to the Metropolitan Atlanta Rapid Transit Authority (MARTA) to extend the North Line from Dunwoody to North Springs, including the Sandy Springs Station.
>
> President Clinton said, "Investing in public transportation helps the nation meet our goal of strengthening economic security for American families, while improving the quality of life and protecting the environment for future generations."

Id.

When I searched the Lexis news system for phrases like "protecting the environment for future generations," the large number of documents found illustrated the cliche quality of such language by public officials. This way of speaking is objectively rooted, even deeply rooted, in American practice. Whether this society is actually willing to insure this protection is another matter.

[453] *See supra* notes 152-82 and accompanying text.

[454] Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

[455] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

The quote concerning "discrete and insular minorities," from footnote 4 in *United States v. Carolene Products Co.*,[456] has furnished generations of American legal thinkers with justification and legitimation of certain categories of judicial review.[457] The footnote anticipates that groups that are the subject of social prejudice may have special need for judicial oversight of the work of the political branches of government.[458] Are future generations such a minority?

Equal protection does not grant special protection to groups simply because they lose, even consistently lose, in the normal give and take of the political process.[459] Instead, special solicitation is given to groups that are routinely subject to various, related disadvantages: "a history of purposeful unequal treatment or subjection to disabilities based on inaccurate stereotyping; social stigmatization; and possession of an immutable defining characteristic that bears no rational relation to a legitimate state purpose."[460]

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[456] *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

[457] *See* Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (referring to footnote 4 as "[t]he great and modern charter for ordering the relation between judges and other agencies of government"). Probably the American legal thinker most influenced by Footnote 4 is John Hart Ely. *See* ELY, *supra* note 94, at 75-77 (discussing Footnote 4 from *Carolene Products Co.*).

[458] *Carolene Prods. Co.*, 304 U.S. at 152-53 n.4 (stating that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry").

[459] *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("'The task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.") (citation omitted); Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) ("Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."); Michael C. Harper & Ira C. Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1211, 1221 (1985) (arguing that equal protection always requires that winners have "principled justifications" for disadvantages political life imposes on losers). While I do not rely on this approach directly, it would certainly apply to a situation in which a current majority has no principled reason for burdening future generations, but is interested primarily in its own convenience.

It seems obvious that future generations do not share these characteristics. Ely even uses the example of legislation burdening the young as a type of law that generally does not require special judicial scrutiny—"most legislators have never been alien, poor, or female. They all were young . . . ."[461] It seems just as clear that environmental values have not been traditionally disfavored by current majorities to the disadvantage of future generations.[462]

But all that is in the past. Never before has humankind faced the kinds of costs that are going to be associated with remedying the related environmental threats I described at the beginning of this article. If the facts are as I describe them above, the question to ask is, "Why are we fiddling while the earth burns?"[463]

The answer Jay Michaelson gives to his own dramatic question has a number of factors, but prominent among them is that the costs of environmental remedies are high and must be paid now, while the harms of global warming are not yet manifest and will affect future generations.[464]

Until now, the costs of environmental regulation have been relatively minor—in the sense that fundamental lifestyle decisions for most of us have been unaffected. Plus, current benefits from regulation have not been wholly absent. Current citizens could expect to breathe purer air and drink cleaner water. What we are called upon to do now, however, is to make serious sacrifices for our descendants.

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[460] Araiza, *supra* note 435, at 415.

[461] ELY, *supra* note 94, at 160.

[462] *See* Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 714-15 (1977) (stating that "discrete and insular minority" analysis inapplicable to environmental claims); *see also* STONE, *supra* note 58, at 424-30.

[463] Michaelson, *supra* note 7, at 74.

[464] *Id.* at 84-101.

We have been unwilling to do this, despite mounting evidence of the coming catastrophe. It does not seem to me that the global warming skeptics[465] are the cause of this paralysis. Rather, our lack of political will is the reason the deniers receive a hearing.

Our refusal to act is completely rational. The odd thing is that we ever do anything for future generations. Given a ten percent discount rate, "the present value of saving a life one hundred years from now is only $581."[466] And even this observation assumes that we care at all about lives saved a hundred years from now. Frankly, why should we?

It is amusing to see conservatives who normally instruct us to accept human nature as incurably selfish,[467] solemnly assure us that "[p]arents are concerned for their children and grandparents for their grandchildren."[468] Maybe biology usually prompts us to protect future generations,[469] or God does, or maybe human nature is not so selfish after all. But we have no personal incentives to act—and many incentives not to act—in the current environmental crises. It should come as no surprise that we have taken no effective action, that we have not been acting responsibly.

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[465] *See* EHRLICH & EHRLICH, *supra* note 42, at 125-41.

[466] Michael B. Gerrard, *Demons and Angels in Hazardous Waste Regulation: Are Justice, Efficiency, and Democracy Reconcilable?*, 92 NW. U. L. REV. 706, 742-43 (1998).

[467] *See, e.g.,* Huffman, *supra* note 411, at 389 (stating "human nature being what it is, our resource allocation institutions must be based upon an understanding of the basic premise that incentives matter. No amount of preaching or teaching will change this reality").

[468] *Id.* at 388.

[469] *See* Paul A. Barresi, *Beyond Fairness to Future Generations: An Intergenerational Alternative to Intergenerational Equity in the International Environmental Arena*, 11 TUL. ENVTL. L.J. 59, 69-70 (1997) (stating "[e]ssentially, evolution has hard-wired our brains so that we have no choice but to care about future generations").

But evolution does not work by giving a living entity "no choice." We could ignore our instincts, to our ultimate harm. "In biology, a species that does not show concern for future generations will be replaced by another that does. The human species has survived thus far because humans have shown such concern. It is possible, however, that humans could lose this concern and be replaced by another species that does show concern." Weiss, *supra* note 156, at 89.

This returns us to the equal protection issue with which I began. The need for special judicial oversight of the political process with regard to certain groups is premised not on the formal characteristics that make up discrete and insular minorities, but rather on the effect those characteristics have on the political process. Fundamentally, equal protection "preclude[s] a refusal to *represent*" any group that has a right to representation in the political process.[470] If we are ready to say that future generations have a right to be heard in the governing process, we must then ask whether there is today an unjustified, actual refusal to represent their interests. If a court becomes convinced that there has been such a refusal, equal protection can provide a remedy.[471]

As with everything else in this paper, the resolution of the equal protection issue depends on how we, and the courts at some later date, view the situation we are in. If the current situation turns out to be normal and the environmentalists absurd alarmists, then there is no need for the courts to intrude into the political process in the name of future generations. In fact, there would be serious harm in doing so. But, if the courts become convinced that a current selfish generation has simply decided to eat, drink and be merry for tomorrow someone else will die, the judiciary has an obligation to act.

PART V—THE DEMISE OF ENVIRONMENTALISM

If humankind is beset by environmental crises, then, in 1996, Michael Greve published perhaps the most ill-timed book in American legal history—*The Demise of Environmentalism in*

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[470] ELY, *supra* note 94, at 82.

[471] *See, e.g.*, E. Joshua Rosenkranz, *A Ghost of Christmas Yet to Come: Standing to Sue for Future Generations*, 1 J.L. & TECH. 67, 78 (1986) (stating that guardians ad litem are often appointed to represent interests of unborn heirs). I do not think that intergenerational standing presents a separate barrier to constitutional environmental protection. The question is whether future generations are protected by the Constitution. If they are deemed to be protected, their future harms are quite real and someone will be able to represent them. Therefore, I do not think special institutional arrangements are necessary. *Cf.* TONN, *supra* note 211.

American Law.[472] Greve's basic thesis is unchallengeably true—that in terms of standing, in *Lujan v. Defenders of Wildlife*,[473] and in terms of takings, in *Lucas v. South Carolina Coastal Council*,[474] the United States Supreme Court has rejected an environmental paradigm for a common-law, private property oriented viewpoint. Furthermore, because the Court occupies a unique role in American political life, "at times . . . reshap[ing] the terms of the political debate . . . ," this change by the Court has had and will continue to have significant political effects.[475]

The book was ill-timed in the sense that these crises, if they are real, will require and will produce much more of an environmental consciousness on the part of courts than ever before. Therefore, the book may have come out at the moment of the beginning of environmental ascent in American law.[476] My purpose is not to review Greve's book, but to note his observations about environmentalism and law insofar as they elucidate the right to a healthy environment. Some of what Greve observes will have to be reversed if the right to a healthy environment is to be accepted in our constitutional culture.

The most important aspect of Greve's book, and the subject he returns to repeatedly, is the rejection of "The Ecological Paradigm."[477] Greve never says exactly what the paradigm is, but states that it "envisions a world in which everything is connected to everything else."[478] Greve explains later in the book that it is this interconnectedness that gives to environmentalism its anti-private property, anti-common law bias.[479] Rights theory in general, and in particular property rights theory, assumes an autonomous realm in which I can use what is mine without harming anyone else and therefore a realm in which no one may legitimately interfere with me.[480] Both the Takings Clause and standing doctrine are premised on this foundation. Conversely, since the ecological paradigm assumes that everything is connected, any use of private property is potentially harmful, thus justifying government regulation without compensation.[481] In addition, since the ecological paradigm assumes that any use of property may be harmful to everyone else, it justifies broad standing.[482]

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[472] GREVE, *supra* note 311, at 125.

[473] 504 U.S. 555 (1992).

[474] 505 U.S. 1003 (1992).

[475] GREVE, *supra* note 311, at 125.

[476] On the other hand, if the crisis turns out to have been exaggerated, or even nonexistent, the backlash will kill environmentalism as an organized political movement.

[477] GREVE, *supra* note 311, at 1.

[478] *Id.*

[479] *Id.* at 107-37.

Greve never shows, or even tries to show that everything is in fact unrelated. He never points to a truly autonomous realm.[483]

The reason Greve fails is because there is no such realm. Take the classic example of a clear right of property—cutting down a tree on my own property. Imagine the outrage if the government were suddenly to forbid people from cutting down trees on their own land.

But the property owner cutting the tree does affect everyone else. This tree is currently producing oxygen, consuming carbon dioxide, conserving soil, holding moisture, and reducing the temperature. Of course, each tree does this only to a small extent. But if there is a right in one landowner to cut down one tree, I am sure Greve would agree there must be a right in all landowners to cut down all trees.

You may object that no one else has a right to the products of the owner's tree, so he may cut the tree down if he likes. But this is so only if the owner ceases to consume the products his tree no longer produces. That, of course, is not what happens. Instead, the free-loading owner continues to enjoy oxygen, reduced carbon dioxide, healthy soil, available water, and a moderate climate. In other words, he cuts down his tree and then refuses to pay other tree owners for the products of their trees.

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[480] *Id.* at 4-5, 26.

[481] *Id.* at 101-22.

[482] *Id.*

[483] We might have good reasons, however, for treating certain uses of property and rights *as if* they were autonomous even though they are not. Greve is trying to support a view that there really is a domain of autonomy.

As this small example shows, all things are connected. I cannot think of this as an ideological claim. It seems like a simple fact. If the Chinese continue to burn more coal, the temperature in Pittsburgh is going to go up. If recent case law requires the belief that things are not related, then that case law will eventually be overruled—because it is based on a false view of the world.

Greve's other major point about environmentalism is that environmentalism is concerned with values rather than harms.[484] In rejecting broad standing and in requiring just compensation for harms, Greve says, the Court is returning to a jurisprudence based on harm, similar to that of the common law.[485]

But, in making this argument, Greve grossly underestimates the actual harm threatened by the environmental crises facing us. These harms are real in the old-fashioned, common law sense. It only takes a couple of extra hurricanes striking the United States to make precautions against global warming extremely cost-effective. As for protection of species and habitat, Greve errs by comparing the cost of protecting one species with the benefit of protecting one species. The benefit of protecting one species, given nature's abundance of species, is essentially zero.

This is a false cost-benefit comparison. Rather, the comparison needs to be preservation of species and habitat in general versus their loss in general. All costs and all benefits must be shown. That comparison is going to favor nature, not development.[486]

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[484] GREVE, *supra* note 311, at 110-15.

[485] *Id.* at 115-18.

[486] *See generally* Janet N. Abramovitz, *Putting a Value on Nature's "Free" Services*, WORLD WATCH, Jan.-Feb. 1998, at 10. This reminds me of the joke about putting a price on nature's assistance in pollination. Experts asked a beekeeper for an estimate of nature's contribution, and he answered, "How much do we have to pay someone to invent bees?"

I am not objecting to private property and private orderings as the primary agent of environmental policy.[487] I do not see why a right to a healthy environment requires regulatory responses if market incentives would work better. But this is a pragmatic issue, rather than a rights-based issue.

In pressing for the use of private orderings, Greve relegates to a cryptic footnote[488] the reasons why the market has failed to protect us from the gathering environmental disasters. The field of economics has understood since the early twentieth century that environmental harm is a true cost of production external to the market because the damage accrues to public goods like air and water—and, now we know, climate—that have no owner and no price.[489] We sometimes call this the Tragedy of the Commons,[490] after Garrett Hardin's 1968 article by that name.[491]

The problems today are actually worse than mere closure of land—Hardin's illustration—which it is theoretically possible to deal with under private ownership. In our situation, however, no one can own "natural oxygen production" or "abundance of species when you don't know which ones you depend on" or "moderate and dependable climate." If someone could capture all the value of these things, and could charge for the damage every time somebody drove a sport-utility vehicle, I am sure there would not be very many such vehicles.

Greve and other conservatives criticize regulation, but then refuse to utter the dreaded T-word—gasoline and carbon taxes—which would internalize the true costs of production and consumption and would help solve our problems. Nor does Greve's book criticize the enormous government subsidies that have built the automobile culture that we now cannot bear to give up, even for the sake of our own children—subsidies that are certainly comparable to bad regulation in terms of inefficiency.

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[487] The sulphur emissions market under the Clean Air Act has by all accounts been a great success, for example. *See, e.g.,* Michael Kranish, *The Politics of Pollution*, BOSTON GLOBE, Feb. 8, 1998, at 16.

[488] GREVE, *supra* note 311, at 13 n.28.

[489] *See* Sanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231, 238 (1997).

[490] *Cf.* SOROOS, *supra* note 20, and NORDHAUS, *supra* note 46.

[491] Garrett Hardin, *The Tragedy of the Commons, reprinted in* MANAGING THE COMMONS 20 (Garrett Hardin & James Baden, eds., 1977).

Greve's final proposal is that the courts adopt "substantive review" of environmental regulations.[492] Under substantive review, courts do not defer to agency expertise, or Congressional will either. Instead, the courts insist that agency action do "more good than harm."

The reader will see in Greve's proposal almost the exact mirror image of what I referred to above as *Payne* review under a right to a healthy environment.[493] But instead of applying this review to a narrow class of legislation described artificially as "environmental," *Payne* review would apply to all government action—or even private actions perhaps—that potentially harm the environment. The *Payne* review insists that the government generally does not do the environment more harm than good.

The *Demise of Environmentalism in American Law* turns out to be a reverse blueprint of what the right to a healthy environment could be expected to accomplish. Under this right, the courts, by their attitude toward the world in general, would change results in numerous areas of law. Of course, takings law and standing would be affected, but so would causation and breach of contract and torts and property and administrative law. Beyond such substantive outcomes, the courts in general, and the United States Supreme Court in particular, would reshape, or help reshape, the terms of debate about the current state of the environment. If the Court were to acknowledge that cutting down a tree, or moving to a pristine lake, does harm to the rest of us, the American people might listen. And if the Court reminded the man in my story that his own great-grandchild might really suffer from climate disruption, the man might be ashamed enough to vote for someone who would ratify the Kyoto Accord.

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[492] GREVE, *supra* note 311, at 68.

[493] *See supra* notes 130-38, 423-30 and accompanying text.

Even if the Court refused for institutional reasons to act in actual cases, the Court's acknowledgment that the notion of a constitutional right to a healthy environment is not frivolous might help unleash a popular constitutional revolution in favor of environmental protection. But, this time, instead of dumping something into a harbor, we would have to clean the harbor out.

PART VI—CONCLUSION

Law, in its ancient form, revealed to man the primal ordering of nature. The first law was the calendar.[494] The Biblical law of the Jubilee, in whose name Jesus said he came, protected man and nature from purely human institutions and exploitation.[495]

In modern time, we have a different view of law. We now see law as another human device to bend men and nature to our will. This modern view of law is now in question, in light of what we are doing to our own environment.

The right to a healthy environment reminds us that we are not bending others, but that we are bent. We are not creators, but creatures. The question facing law is, out of what view of man and nature will it speak to the future?

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[494] *See* Robert D. Taylor, *Reclaiming Our Roots: Law and Mythology*, 29 DUQ. L. REV. 271, 277-78 (1991) ("[T]he calendar, which was made possible through observation and understanding of the celestial order, became, in a sense, the first statutory enactment, the first lawbook or code, legislating the right time for planting and for harvesting and mandating the proper time for performing religious rituals associated with these primary activities.").

[495] *See* Bruce Ledewitz & Robert D. Taylor, *The Law of the Jubilee in Modern Perspective*, 22 VT. LAW REV. 157, 157-58 (1997).

CITY OF BOERNE V. FLORES: AN ESSAY ON THE INVALIDATION OF THE RELIGIOUS FREEDOM RESTORATION ACT

Lino A. Graglia[*]

In *City of Boerne v. Flores*,[1] the Supreme Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA),[2] which replaced the Minnesota Mortgage Moratorium Act of 1933, upheld in *Home Building & Loan Ass'n v. Blaisdell*,[3] as perhaps the most unconstitutional statute in the history of the nation. The RFRA violated the principles of representative self-government, federalism, and separation of powers that are the pillars of the Constitution. More specifically, it violated the very constitutional provisions that it purported to enforce, the religion clauses of the First Amendment.

The First Amendment provides that "Congress shall make no law...prohibiting the free exercise [of religion]."[4] For most of our history, this meant in law what it means to any sensible person: Congress may not disadvantage any person on the basis of his religious affiliation or beliefs.[5] Few people would understand it to mean that Congress must *advantage* religious believers by exempting them from the application of ordinary law. A regime of religious freedom—a great achievement in historical terms—is a regime in which religion is neither a basis for government regulation nor a reason for exemption from government regulation; law simply should be neutral in regard to religion. All of this seems perfectly clear, however, only until it is subjected to lawyerly analysis and the exercise of lawyerly skills. Few lawyers are more skilled in the lawyerly arts than Professor Douglas Laycock, who largely wrote the Religious Freedom Restoration Act, and argued to uphold it in the *Boerne* case.[6]

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[1] 521 U.S. 507 (1997).

[2] 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

[3] 290 U.S. 398, 444 (1934) (upholding, by five to four vote, debtor-relief law of type that Article I, section 10 of United States Constitution was meant to prohibit).

[4] U.S. CONST., amend. 1.

[5] *E.g.*, Braunfeld v. Brown, 366 U.S. 599, 606 (1960) (stating that to invalidate "legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature").

A rule of government neutrality in regard to religion is so obviously desirable that it is impossible to challenge it openly and directly. The inherent defect in any attempt to maintain a system of law, however, is that there is no rule so definite and clear that it may not be subverted by a simple redefinition of its terms. The words control the rule, but clever and well-placed individuals can control the words. Professor Laycock therefore announced that while neutrality is indeed the constitutional requirement, we must realize that there are different *kinds* of neutrality.[7]

Professor Laycock found it necessary to distinguish between "formal neutrality," usually qualified by "mere," and "substantive neutrality," neutrality with real potential.[8] According to Laycock, "substantive neutrality" has a meaning not only different from, but the exact opposite of simple, plain vanilla neutrality. A law is "substantively" neutral as to religion not when it disallows religious discrimination, but when it *requires* it. Neutrality is still the requirement, there is no quarreling with that, it's just that it now means discrimination. Nothing better illustrates the essence of the lawyerly arts.

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[6] *See* Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 21 n.158 (1996).

[7] Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

[8] *Id.* at 999-1006.

In the old days, before the advances in philosophical analysis that characterize the postmodern era, neutrality just meant neutrality. It came to pass, however, that the United States suffered the ultimate misfortune of government by intellectuals. Minds of the caliber of Earl Warren's, Hugo Black's, William J. Brennan, Jr.'s, William O. Douglas's, and Arthur Goldberg's, capable of understanding and even extending philosophical advance, and constituting a Supreme Court majority, came to be the primary policy makers of the nation on any subject they might choose.

In the 1963 case of *Sherbert v. Verner*,[9] Justice Brennan announced that to deny unemployment compensation to a person who refused to comply with the statutory requirements for such compensation, when the refusal is due to the person's religion, would be to officially declare that religion "abhorrent"[10] and to impose a "fine"[11] on its practice. Justice Douglas, not to be outdone in preposterousness, added that such a result would lower the status of religious people in this country to their status in the Soviet Union.[12] These opinions are typical of the level of intellect and integrity involved in the making of constitutional law. As it has nothing to do with truth, rationality, or intellect, and almost invariably advances liberal causes,[13] it is the form of policy-making overwhelmingly favored by today's law professors.

Justice Brennan thus worked still another revolution in constitutional law, potentially transferring to the Court another vast area of policy-making. The idea of a general religious exemption from ordinary law seemed sufficiently implausible to most of the Justices most of the time; however, that went nowhere outside of the unemployment compensation area,[14] except for the case of the irresistibly appealing Amish. The people of Wisconsin, a highly progressive group, had the notion that it would be useful for children to have a high school education. In *Wisconsin v. Yoder*,[15] however, Chief Justice Burger determined that the value of such education is easily overstated and that it was of only "speculative" value[16] in the case of the Amish, a group so commendable, Burger pointed out, that they accept no public welfare.[17] People that *good*, it seems, should be able to do what they want with their kids, and fortunately, the Constitution was there, as always, to prevent still another act of oppression.

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[9] 374 U.S. 398 (1963).

[10] *Sherbert*, 374 U.S. at 402.

[11] *Id.* at 404.

[12] *Id.* at 412 (Douglas, J., concurring).

[13] *See* Lino A. Graglia, *"Constitutional Theory": The Attempted Justification of the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789 (1987) (discussing contemporary constitutional theory as justification for recent Supreme Court decisions).

[14] *See* Frazle v. Illinois Dept. of Employment Sec., 489 U.S. 829, 835 (1989)

In 1990, however, in *Employment Division v. Smith*,[18] the peyote case, the Court declared, in an opinion by Justice Scalia, that there is no general religious exemption from ordinary law.[19] *Sherbert* and *Yoder* were not overruled, as they should have been, but instead were imaginatively found to involve special and distinguishable situations.[20] If judicial activism is understood, as it should be, as courts holding unconstitutional things that are not—that is, the unwarranted

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(holding denial of unemployment benefits to worker who refused position because his job required him to work on Sunday violated Free Exercise Clause of First Amendment); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-40 (1987) (holding refusal to award unemployment compensation benefits violated Free Exercise Clause of First Amendment); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) (holding denial of unemployment compensation benefits violated First Amendment freedom of religion).

[15] 406 U.S. 205 (1972).

[16] *Yoder*, 406 U.S. at 224.

[17] *Id.* at 222.

[18] 494 U.S. 872 (1990).

[19] *Smith*, 494 U.S. at 879. The Court held that the Free Exercise Clause does not prohibit a state from applying its drug prohibitions to the sacramental use of peyote and to deny employment benefits to workers dismissed for such use. *Id.* at 878-79.

[20] *Id.* at 881-84. In *Sherbert*, the state's unemployment compensation system took into account each applicant's circumstances. *Id.* The *Smith* Court concluded that if a state allowed a "system of individual exemptions," it could not, absent a compelling interest, refuse an exemption in a case of religious hardship. *Id.* at 884. The Court distinguished *Yoder* by pointing out that it involved the Free Exercise Clause in conjunction with the constitutional right, created in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), of parents to direct the education and upbringing of their children. *Smith*, 494 U.S. at 881.

judicial removal of policy choices from the political process—*Smith* was the most important of the Rehnquist Court's very few attempts to retreat from activism. Much more of that sort of thing would mean that whole areas of policy-making would revert to the hands of the American people, and what then would be the point of having a Constitution? Constitutional scholars, keenly aware of the pitfalls in a system of representative self-government on a state-by-state basis, were determined to put the issue of religious exemption from ordinary law back in the hands of courts. A wave of protest that was nearly unanimous[21]—unanimity is usually an indicator that something is amiss—resulted in the enactment by Congress of the Religious Freedom Restoration Act, later invalidated by the Supreme Court in *Boerne*.

The purpose of the RFRA was to "overrule" *Employment Division v. Smith*, but the drafters faced an unsolvable dilemma. On the one hand, it was hardly possible to allow religious objections to override every law (after all, some religions have required human sacrifice), a course that would be a prescription for anarchy. On the other hand, the standard of reasonableness—that is, that a challenged law could serve a valid secular purpose—was not enough; that was the rule of *Employment Division v. Smith* that the drafters sought to overturn. The need was to impose a requirement of *more* than reasonableness, which is to say, of unreasonableness. Because such a requirement cannot be defined, Congress made no attempt to do so in the RFRA, providing instead that the requirement was to be whatever it was in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[22] Under the RFRA, a law challenged as interfering with a religious belief or practice was to be presumed invalid, and upheld only if the state demonstrated to the satisfaction of a federal district judge that the law's application in a particular case would serve a "compelling interest" in the least restrictive way.[23]

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[21] *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1 (1990); Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

[22] 42 U.S.C. § 2000bb(b)(1) (1994) (stating that purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert* and *Yoder*").

Is there anything in the Constitution that this statute did not violate? Perhaps reason enough to condemn the RFRA can be found in the fact that it was deceptively named; policy choices can be difficult, but dishonesty can easily be condemned. Few Americans were aware in 1993 that their religious freedom had deteriorated and was in need of restoration. Far from "restoring" anything, the Act created a sweeping religious exemption—so unqualified that it was applicable even in prisons and the military—that had never before existed.[24] It is not clear which constitutional provision disallows deceptively titled laws, but invalidation of the Act would not be activism, one could argue, but the mere disallowance of fraud.

The RFRA, however, had even more serious problems. To begin with, it is hard to imagine a greater perversion of the Constitution than the idea that the religion clauses of the First Amendment, the purpose of which was to guarantee the states freedom from federal interference in matters of religion,[25] should be taken as authorizing precisely such interference. *Roe v. Wade*[26] is rightly denounced as based on nothing, but the decisions of the Supreme Court, an arm of the federal government, which interfere with the states in matters of religion, are even worse; they violate the very constitutional provisions on which they purport to be based. The incorporation doctrine, a fantasy in any case,[27] reaches its height of absurdity and impropriety when applied to the religion clauses.[28]

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[23] 42 U.S.C. 2000bb-1(a) to (b) (1994).

[24] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (holding that *Sherbert* compelling interest standard does not apply to prisons); Goldman v. Weinburger, 475 U.S. 503, 503-06 (1987) (stating that *Sherbert* does not apply to military); *see also* Graglia, *supra* note 6, at 67-68 (predicting harmful effects of RFRA in prison context).

[25] *See, e.g.*, ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1922).

[26] 410 U.S. 113 (1973).

[27] See, *e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

[28] *See, e.g.*, Kurt J. Lash, *The Second Adoption of the Establishment Clause:*

The RFRA violated the constitutional principle of representative self-government by transferring policy-making power, on an unlimited number of issues, from the elected representatives of the people to unelected federal judges. It violated the principle of federalism by transferring policy-making power from state or local officials to national officials. It violated the principle of separation of powers by transferring policy-making power from legislatures to the judiciary. To make a fuss about federal gun control laws, as in *United States v. Lopez*,[29] the guns around schools case, or *Printz v. United States*,[30] the Brady Bill waiting period case, while tolerating the RFRA, is to strain at gnats while swallowing a camel; it is simply to fail to understand what is involved.

To say that the RFRA is a constitutional outrage is not to say, however, that the Court should declare it so. Congress purported to enact the statute pursuant to its authority to enforce the Fourteenth Amendment.[31] The Court held that that authority does not include the power to prohibit what the amendment itself, as "interpreted" by the Court, does not, except where there is a remedial justification. That ruling is not entirely consistent with earlier decisions[32] and constitutes a strong reassertion of judicial supremacy in constitutional interpretation. Although the ruling could be described in "separation of powers" terms, it is ultimately based on the federalism ground that the Act exceeded Congress' limited legislative authority and therefore improperly invaded the authority of the states. For many reasons, the enforcement of supposed limitations on federal legislative authority—the attempt to maintain a regime of "dual sovereignty"—is not a feasible or

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The Rise of Nonestablishment Principle, 27 ARIZ. L. REV. 1085 (1995).

[29] 514 U.S. 549 (1995).

[30] 521 U.S. 98 (1997).

[31] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[32] *See* Rome v. United States, 446 U.S. 156 (1980) (holding that 1965 Voting Rights Act did not violate principles of federalism and was constitutional method of enforcing Fifteenth Amendment); Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding that Congress could use its power under Section 5 of Fourteenth Amendment to prohibit literacy tests for voting even though amendment itself did not).

appropriate role for the Court.[33]

It is somewhat startling to see the Court in *City of Boerne* citing Reconstruction Era race cases that had, to say the least, not been looked upon with favor in recent decades. In the 1883 *Civil Rights Cases*,[34] for example, the Court invalidated the 1875 Civil Rights Act which prohibited race discrimination in places of public accommodation, thereby giving us public segregation for eighty-nine more years, until Congress prohibited it again in the 1964 Civil Rights Act.[35] This decision, like *Dred Scott v. Sandford*,[36] which helped give us the Civil War, strongly supports the view that judicial review in not a good idea.[37] The Court held that Congress' power to enforce the Fourteenth Amendment extends only to state, not private, action. That was not an unreasonable position, although the two are often difficult to distinguish,[38] but under the broad view of federal power taken in *McCulloch v. Maryland*,[39] it would seem that the decision could better have been left to the discretion of Congress.

The RFRA was an unmitigated disaster, the product of people ignorant of the source of this country's greatness and strength, and heedless of the minimal requirements for a viable society. It presented a very rare example of a statute that was clearly inconsistent with the Constitution. The RFRA should have been held invalid, however, not on the ground of lack of congressional authority, but on the ground that it violated the religion clauses of the First Amendment. The clear purpose of the First Amendment, as noted above, was to preclude Congress from doing precisely what the RFRA did, that is, interfere with the states in matters of religion. Justice Stevens took a somewhat similar position in his concurring opinion in *City of Boerne*, arguing that the Act violated the Establishment Clause because it favored religion over irreligion.[40] Perhaps a better argument is that granting an exemption from the requirements of ordinary law to members of a particular religion abridges everyone else's religious freedom by putting their religions at a comparative disadvantage, thereby making them less attractive.

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[33] *See* Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 767-71 (1996).

[34] 109 U.S. 3 (1883).

[35] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1971, 2000a-f (1970)).

[36] 60 U.S. (19 How.) 393 (1856).

[37] *See, e.g., "Interpreting" the Constitution: Posner on Bork*, 42 STAN. L. REV. 1019, 1020 (1992).

[38] *See* Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 780-82 (1989).

[39] 17 U.S. (4 Wheat.) 316 (1819).

The RFRA was the result of a peculiar and unique combination of forces. Religious leaders favored the law because they simply could not resist the temptation of being granted an exemption from the operation of ordinary law. Religious institutions undoubtedly suffer from an excess of law and regulation, but so does everyone else; to grant relief only to an especially effective opponent of excessive regulation is to leave everyone else even more vulnerable. The understandable desire of religious leaders for a religious exemption was strong enough to blind them to the fact that the RFRA was very unlikely to be in their (or society's) long range interest. Sufficient evidence of this was provided by the fact that the RFRA was also strongly favored by the American Civil Liberties Union, the adamant opponent of school prayer, every expression of religion in American life, and every form of government support for religious institutions. The ACLU supported the RFRA, not because of a sudden warming toward religion, but only because the Act could not prove to be anything but a disruptive force in American society, wreaking havoc, for example, in prison administration and the military.[41]

Democracy must include the right of the people to make mistakes. It is claimed, however, that judicial review can be justified on the ground that it requires a "sober second thought" by the people,[42] giving them a chance to correct the results of their temporary "ill humors."[43] If so, judicial review has never been more justified than in the Court's invalidation of the RFRA.

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[40] City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

[41] *See* Gerald V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 311-18 (1991).

[42] Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L.

REV. 4, 25 (1936).

[43] THE FEDERALIST PAPERS, NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

RECENT DECISION

THE TAKINGS CLAUSE—"PRIVATE PROPERTY"—INTEREST INCOME GENERATED BY CLIENT FUNDS HELD IN IOLTA ACCOUNTS IS "PRIVATE PROPERTY" OF CLIENT FOR PURPOSES OF TAKINGS CLAUSE

A public interest group, a Texas attorney, and a Texas citizen brought a lawsuit against the Texas Equal Access to Justice Foundation (TEAJF), its chairman, and all nine justices of the Texas Supreme Court, alleging that the Texas Interest on Lawyers Trust Account (IOLTA) program violated their rights under the Fifth Amendment by taking their property without just compensation.[1] The plaintiffs sought just compensation for the interest proceeds that the Texas IOLTA program earned from their deposits.[2]

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[1] Phillips v. Washington Legal Found., 118 S. Ct. 1925, 1929 (1998). Texas's Interest on Lawyers Trust Account (IOLTA) program required attorneys to collectively place certain client funds in an interest-bearing bank account, the interest of which was paid to The Texas Equal Access to Justice Foundation (TEAJF). *Phillips*, 118 S. Ct. at 1929. The plaintiffs in the original action were the Washington Legal Foundation, a public-interest law and policy center, with members in Texas who were opposed to the Texas IOLTA program; Michael Mazzone, a Texas attorney who deposited client funds in an IOLTA account; and William Summers, a Texas citizen whose funds were deposited in an IOLTA account. *Id.*

[2] *Phillips*, 118 S. Ct. at 1929. In addition, the plaintiffs sought a declaratory

The United States District Court for the Western District of Texas held that the plaintiffs had no property interest in the interest proceeds earned on funds deposited in IOLTA accounts.[3] The United States Court of Appeals for the Fifth Circuit reversed.[4] The United States Supreme Court granted certiorari and held: Affirmed and remanded.[5] The Court held that where interest is earned on client funds held in IOLTA accounts, the interest is the "private property" of the client for purposes of the Takings Clause.[6]

I. Related Law

Despite surrounding controversy, every state, including Texas, has approved an IOLTA program.[7] Most of the chal-

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judgment finding the IOLTA program unconstitutional, injunctive relief prohibiting mandatory participation in the IOLTA program, a return of the full amount of interest earned on plaintiffs' money placed in IOLTA accounts, and an award of costs and attorneys' fees. Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 3 (W.D. Tex. 1995).

[3] *Phillips*, 118 S. Ct. at 1929. The trial court granted the defendants' motion for summary judgment. *Id.*

[4] *Id.* The Fifth Circuit concluded that any interest that accrued belonged to the owner of the principal. *Id.*

[5] *Id.* at 1934. The Court recognized the split in jurisdictions over the issue and granted certiorari. *Id.* at 1929-30. The Court expressed no view as to whether the funds held in IOLTA accounts had been "taken" by the State or the amount of "just compensation," if any, due respondents. *Id.* at 1934. The Court left these issues to be addressed by the court of appeals on remand. *Id.*

[6] *Id.* The Court reasoned that the traditional rule that "interest follows principal" applied to this scenario. *Id.* at 1930-31. Further, the Court found it undisputed that the client was the owner of the principal amount deposited into IOLTA accounts. *Id.* at 1930. Thus, the Court held that the client was entitled to the interest that accrued on this principal. *Id.* at 1932. The Court also reasoned that property generated valuable rights, even though the property may have had no economically realizable value to the owner. *Phillips*, 118 S. Ct. at 1933. Although the interest income at issue lacked a positive economic value, the Court stated that the client's valuable rights consisted of the possession, control and disposition of the interest. *Id.*

[7] Joseph L. Kociubes, *IOLTA Wars*, 42 Boston B.J. 15, 22 (1998). One commentator opined that perhaps no program has been challenged as often in the United States as IOLTA programs. *Id.* Clients frequently entrust attorneys with client funds. *Id.* Prior to the adoption of IOLTA programs, attorneys deposited these funds in non-interest bearing accounts, according to federal law. *Id.* In 1980, federal law for the first time permitted interest to be paid on demand de-

lenges to IOLTA programs invoked the Takings Clause of the Fifth Amendment to the Constitution.[8]

A. *The Analysis of a Takings Claim*

The United States Supreme Court addressed a takings claim under the Fifth Amendment in *Penn Central Transportation Co. v. City of New York.*[9] In *Penn Central*, a commission refused to approve construction plans for a building which was designated a "landmark."[10] The United States Supreme Court held that the application of a landmarks pres-

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posits, provided a non-profit organization held the benefit of such deposits. 12 U.S.C. § 1832(a)(2) (1988). A Federal Reserve Board letter concluded that corporate funds could be held in this manner so long as charitable organizations had "exclusive right to the interest." Letter from Michael Bradfield, General Counsel, Federal Reserve Board, to Donald Middlebrooks (Oct. 15, 1981), *reprinted in* Donald M. Middlebrooks, *The Interest on Trust Accounts Program: Mechanics of its Operation*, 56 FLA. B.J. 115, 117 (1982). In 1984, Texas implemented an IOLTA program that allowed attorneys who received client funds that were "nominal in amount" or were "reasonably anticipated to be held for a short period of time" to place such funds in a separate, interest-bearing account. Texas Rules of Court—State, Rules Governing the Operation of the Texas Equal Access to Justice Foundation, Rule 4, 7 (West 1997) (hereinafter Texas Rules). Funds qualified if the attorney determined that such funds "could not reasonably be expected to earn interest for the client or if interest that might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account." Texas Rule 6. The program established that the TEAJF, a nonprofit corporation with the primary purpose of providing legal services to low income persons, would receive the interest earned by funds deposited in IOLTA accounts. Texas Rules 9(a), 10. The Internal Revenue Service exempted IOLTA revenue from the taxable income of clients so long as the client had no choice whether to participate in the program. Rev. Rul. 81-209, 1981-2 C.B. 16.

[8] Dan Chern, *Why Mandatory IOLTAS Should be Eliminated*, 4 TEX. WESLEYAN L. REV. 123, 124 (1997). The Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. *See also* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987) (holding that Takings Clause does not prohibit taking of private property, but instead places condition on exercise of that power); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating that government could hardly continue if every time law changed government had to pay for diminution in values incident to property).

[9] 438 U.S. 104 (1978).

[10] *Penn Cent.*, 438 U.S. at 117. The City placed restrictions on the development of individual historic landmarks as part of a comprehensive program to preserve historic landmarks and historic districts. *Id.* at 109.

ervation law did not constitute a "taking" of the plaintiffs' property without just compensation.[11] The Court first ascertained whether a constitutionally cognizable property interest existed.[12] The Court reasoned that the law adjusted the benefits of economic life to promote the common good and had not interfered with the building's present uses or any reasonable investment expectations of the building.[13]

B. The Existence of a Constitutionally Protected Property Interest

The United States Supreme Court addressed the issue of what kind of property interests the Constitution protects in *Board of Regents of State Colleges v. Roth.*[14] A state university hired the claimant in *Roth* to teach for a fixed term, and at the end of the term, informed the claimant he would not be rehired for the next year.[15] The United States Supreme Court held that the terms of the claimant's employment granted him no protected property interest.[16] The Court reasoned that, although the plaintiff had an abstract interest in being rehired, a property interest consisted of more than an abstract desire or unilateral expectation of a benefit.[17]

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[11] *Id.* at 138. The Court identified several factors that had particular significance when considering a takings claim. *Id.* at 124. These factors included the economic impact of the regulation on the claimant, the extent to which the regulation interfered with distinct investment-backed expectations, and the character of the governmental action. *Id.*

[12] *Id.* at 124-25. The Court initially determined whether the plaintiffs' claim constituted "property" for purposes of the Fifth Amendment. *Id. See also* Ruckelshaus v. Monsanto, 467 U.S. 986, 1001 (1984) (noting that property interests must be ascertained before proceeding with Takings Clause analysis).

[13] *Penn Cent.*, 438 U.S. at 138. The Court stated that it recognized a taking more easily when the government physically invaded property, as opposed to when a regulatory scheme adjusted the burdens and benefits of economic life to promote the general welfare. *Id.* at 124. The Court stated that, in the past, it found takings challenges meritless when the challenged governmental actions prohibited a beneficial use to which the property had previously been devoted, in order to promote the public good. *Id.* at 125. *See* Goldblatt v. Hempstead, 369 U.S. 590, 593-94 (1962) (holding that no taking had occurred because restriction served substantial public purpose); Miller v. Schoene, 276 U.S. 272, 279 (1928) (concluding that State had not exceeded its constitutional powers by deciding upon destruction of one class of property in order to save another which was of greater value to public); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (recognizing that Court has often upheld substantial regulation of owner's use of his own property where deemed necessary to promote public interest). The Supreme Court has also stated that the appropriation of money does not constitute a physical taking, since money, unlike real or personal property, is fungible. United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989).

[14] 408 U.S. 564 (1972).

C. Interest Earnings as a Recognized Property Interest

1. The General Rule that "Interest Follows Principal"

The United States Supreme Court addressed the issue of whether a plaintiff had a recognized property interest in the interest earned on an interpleader account in *Webb's Fabulous Pharmacies, Inc. v. Beckwith.*[18] In *Webb's*, the appellant challenged a Florida statute, which provided that all interest earned on deposits with the court became the property of the clerk, on the ground that it was an unconstitutional "taking" under the Fifth and Fourteenth Amendments.[19] The Supreme Court affirmed the general rule that "interest follows principal" and stated that interest earned on a deposit of principal belonged to the owner of the principal.[20] The Court reasoned that the earnings of a fund were property just as the fund itself was property.[21]

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[15] *Roth,* 408 U.S. at 566. State law left the decision of whether to rehire a non-tenured teacher for another year to the discretion of university officials, as there was no statutory standard that provided otherwise. *Id.* at 566-67.

[16] *Id.* at 578. The Court also stated that no state statute or university rule supported a possible claim of entitlement to re-employment for the plaintiff. *Id.* The Court found that independent sources, such as state law, created property interests, not the Constitution. *Id.* Our nation's founders purposely left the vital constitutional concept of "property" to gather meaning from experience. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). The United States Supreme Court held that, generally, the several States, as opposed to the United States, possessed the residual authority that enabled "property" to be defined. PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

[17] *Roth,* 408 U.S. at 578. The Court stated that the plaintiff failed to assert a legitimate claim of entitlement to the benefit in which he claimed a property interest. *Id.* at 577. The Court reasoned that the purpose behind the established concept of property was to protect those claims upon which people relied in their daily lives. *Id.* Property encompasses the notion of the ownership of or right to a particular thing, whether real or personal, tangible or intangible. Katherine Elrich, *'Equal Justice Under the Law,' (If You Can Afford It): Fifth Circuit Threatens Texas' IOLTA Program:* Washington Legal Foundation v. Texas Equal Access to Justice Foundation, *94 F.3d 996 (5th Cir. 1996)*, 28 TEX. TECH L. REV. 887, 889 (1997). The United States Supreme Court stated that property includes every sort of interest a citizen possesses. United States v. General Motors Corp., 323 U.S. 373, 378 (1945). *See generally* 26 AM. JUR. 2D *Eminent Domain* § 171 (1996) (stating that "property," as used in Constitution, extends to every species of right or interest upon which it is practicable to place monetary value).

[18] 449 U.S. 155 (1980).

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[19] *Webb's*, 449 U.S. at 155-56. The plaintiffs deposited $1.8 million into a Florida court registry for a dispute over the purchase of a pharmacy. *Id.* at 156-57. A Florida statute required that the principal deposited with the court be placed in an interest-bearing account, and provided that the interest earned belonged to the State. *Id.* Another statute also authorized the clerk to deduct a fee for services rendered for receiving money into the court. *Id.* By the time the parties resolved the conflict, the account earned over $100,000 in interest. *Id.* at 158. The plaintiff contended that the principal amount deposited was private property, and by withholding the interest earned, the court performed an uncompensated "taking" under the Fifth Amendment. *Id.* at 159.

[20] *Id.* at 162. The Court held that the general rule was that any interest on an interpleaded and deposited fund followed the principal and should be allocated to those who were the ultimate owners of the principal. *Id.* English common law established the rule that "interest follows principal." *Id. See* Beckford v. Tobin, 1 Ves. Sen. 308, 310, 27 Eng. Rep. 1049, 1051 (Ch. 1749) (stating that interest follows principal like shadow follows body). As one Justice stated long ago, "interest goes with the principal, as the fruit with the tree." Himely v. Rose, 9 U.S. (5 Cranch) 313, 319 (1809) (Johnson, J., dissenting).

The rule that "interest follows principal" was deeply established in Anglo-Saxon jurisprudence, and courts showed no inclination to modify this traditional rule. Kevin H. Douglas, *IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property*, 50 VAND. L. REV. 1297, 1310-11 (1997). *See also* Sellers v. Harris County, 483 S.W.2d 242, 243 (Tex. 1972) (stating that interest earned by deposit of money owned by parties to lawsuit is increment that accrues to that money as well as its owners).

The Court also held that a state could not circumvent a takings claim by simply redefining private property as public property. *Webb's*, 449 U.S. at 164. The Court reasoned that because the statute, by "ipse dixit," transferred ownership of the interest earned from the owners of the principal to the government, the state's action amounted to an unconstitutional taking. *Id. See also* Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1199 (9th Cir. 1998) (stating that *Webb's* holding demonstrates that constitutionally-protected property rights do exist despite statutes that appear to deny their existence).

[21] *Webb's*, 449 U.S. at 164. The Court asserted that Florida followed the rule that the principal sum deposited in an interpleader fund was private property, not public property. *Id.* at 160. Thus, the Court, following the "interest follows principal" rule, reasoned that the interest earned on the fund was merely an

2. *Interest Earned on IOLTA Accounts as a Recognized Property Interest*

The United States Court of Appeals for the Eleventh Circuit directly addressed whether the interest earned on nominal or short-term funds held in an IOLTA account was the property of the client for purposes of the Fifth Amendment in *Cone v. Florida Bar*.[22] In *Cone*, the client alleged that the appropriation of interest earned on her IOLTA funds constituted an uncompensated taking of private property in violation of the Fifth Amendment.[23] The court held that because the funds generated no net value, the interest was not within the legitimate expectations of the principal owners.[24] The

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incident of ownership of the fund itself. *Id.* at 164. However, the Court limited its holding to the narrow circumstances of the case: where a statute authorizes a fee for holding private funds in an interpleader account, withholding the interest earned on the funds amounts to a taking in violation of the Fifth and Fourteenth Amendments. *Id.* at 164-65. Many courts have refused to extend *Webb*'s holding to other fact situations. *See* Molloy v. Monsanto, 1994 WL 326237, at *12 (D. V.I.) (stating that *Webb's* could not be construed so broadly as to apply to right to receive interest on retirement annuity); Rogers v. Buck County Domestic Relations Section, 959 F.2d 1268, 1276-77 (3d Cir. 1992) (stating that *Webb's* did not apply to denial of interest on funds intercepted for past-due child support payments). Other courts have also refused to apply the holding in *Webb's* to cases involving IOLTA challenges. *See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 975-76 (1st Cir. 1993) (stating that there were only "superficial similarities" between *Webb's* and case involving IOLTA program); Cone v. Florida Bar, 626 F. Supp. 132, 135 (M.D. Fla. 1985) (stating that facts of *Webb's* were "clearly distinguishable from IOLTA program"); Carroll v. State Bar, 166 Cal. App. 3d 1193, 1205 (Cal. Ct. App. 1985) (finding that *Webb's* did not address issues pertinent to IOLTA program's constitutionality).

[22] 626 F. Supp. 132 (1985).

[23] *Cone*, 626 F. Supp. at 133. The law firm involved neglected to return a residuary amount of a cost deposit to the client. *Id.* at 134. The residuary amount earned interest while in an IOLTA account. *Id.* When the firm returned the residuary amount, but not the interest, to the client, the client claimed this retention amounted to an uncompensated taking of private property in violation of the Fifth Amendment. *Id.*

[24] *Id.* at 136. The court refused to consider the takings claim because the client failed to meet the initial burden of establishing a legitimate claim of entitlement to the interest. *Id.* at 134-35. The court held that no claim of entitlement existed for the plaintiff's nominal funds, which held on their own, had no net value. *Id.* The United States Supreme Court stated that when government merely regulates the use of property, compensation is measured by the extent to which

court reasoned that the plaintiff's funds, by themselves, could not have earned interest, and the funds earned interest only through implementation of the IOLTA program.[25]

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the regulation deprived the owner of economic use of the property. Yee v. Escondido, 503 U.S. 519, 522-23 (1992). In light of the Fifth Amendment, the Court said the owner should be placed in as good a position pecuniarily as if his property had not been taken. Olson v. United States, 292 U.S. 246, 255 (1934). However, critics argue that IOLTA does not change the financial perspective of the client, as the client had no expectation of interest before IOLTA, and none after. W. Frank Newton and James W. Paulsen, *Constitutional Challenges to IOLTA Revisited*, 101 DICK. L. REV. 549, 582 (1997). One commentator notes that because IOLTA programs rely exclusively on this interest, if clients were permitted to claim this interest as their own, IOLTA programs would surely fall. George Sistrunk, Washington Legal Foundation v. Texas Equal Access to Justice Foundation: *The End of Interest on Lawyers' Trust Accounts Programs or an Aberration to be Ignored?*, 32 WAKE FOREST L. REV. 1021, 1044 (1997). The United States Supreme Court has held that to constitute "property," the government action must have interfered with interests that sufficiently encompassed the reasonable expectations of the claimant. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978). The Supreme Court also held that interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. Andrus v. Allard, 444 U.S. 51, 66 (1979). The Court stated that the Fifth Amendment does not require compensation for a mere expectancy of profit, which was not a vested property interest. Almota Farmers Elevators & Warehouse Co. v. United States, 409 U.S. 470, 482 (1973).

[25] *Cone*, 626 F. Supp. at 135. The court reasoned that IOLTA programs created the capacity to earn interest—a capacity that remained viable only through IOLTA programs. *Id.* A commentator noted IOLTA programs create interest where there was none before. Brennan J. Torregrossa, Washington Legal Foundation v. Texas Equal Access to Justice Foundation: *Is There an Iota of Property Interest in IOLTA?*, 42 VILL. L. REV. 189, 216 (1997). Another analyst stated that the interest could not be property when a state's intervention was necessary to produce interest in excess of costs. *See* Sistrunk, *supra* note 24, at 1040. The Supreme Court held that when a right had value solely because of the government, the created value belonged to the government and no other. United States v. Twin City Power Co., 350 U.S. 222, 228 (1956). *See* United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 76 (1913) (concluding additional value created by government intervention represents no actual loss; thus, there would be no justice in paying for loss suffered by no one).

The United States Supreme Court stated that the gain to the taker must be rejected as a measure of obligation, as it may be wholly unrelated to the deprivation imposed on the owner. Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). The Court held that the consideration was not what the taker gained, but rather, what the owner lost. Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910). The Court also noted that a permitted increase in compensation due to an alteration in market value, attributable to the government project itself,

3. The Right to Control or Exclude Others from the Interest Earned on IOLTA Accounts

In a more recent challenge to a state's IOLTA program, *Washington Legal Foundation v. Massachusetts Bar Foundation*,[26] the United States Court of Appeals for the First Circuit addressed whether a state's IOLTA program violated the Fifth Amendment.[27] The plaintiffs in this case, however, claimed a constitutional interest, not in the income earned, but in the right to control and exclude others from the beneficial use of their funds.[28] The court held the "right to exclude," as related to intangible property, was not a recognized property interest protected by the Fifth Amendment.[29] The court found no authority recognizing a constitutionally-protected property right to control or exclude others from the beneficial

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would not lead to what the Constitution required. United States v. Reynolds, 397 U.S. 14, 16 (1970). *See also* Washington Legal Found. v. Texas Equal Access to Justice Found., 106 F.3d 640, 644 (5th Cir. 1997) (Benavides, J., dissenting) (finding it fatal to claim against IOLTA program that in order to have property interest, plaintiffs must rely on existence of program they seek to eliminate).

[26] 993 F.2d 962 (1st Cir. 1993).

[27] *Massachusetts Bar*, 993 F.2d at 968. The plaintiffs also alleged that the Massachusetts IOLTA program violated the First Amendment by compelling them to support speech they found offensive. *Id.* at 970.

[28] *Id.* Perhaps as a response to many other jurisdictions' holding that clients do not have a constitutionally-protected property right to the interest earned on IOLTA accounts, the plaintiffs avoided this issue and instead claimed a property right to the beneficial use of their funds. *Id.* at 973.

[29] *Id.* at 974. The court stated that all asserted property interests are not entitled to constitutional protection, as a "mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Id.* at 973 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)). A critic opined that a constitutionally-cognizable property interest includes more than a psychological desire to affect the interest earned on IOLTA accounts, which only amounted to a unilateral expectation or an abstract need. Betsy Borden Johnson, *"With Liberty and Justice For All" - IOLTA in Texas - The Texas Equal Access to Justice System*, 37 BAYLOR L. REV. 725, 747 (1985). The United States Supreme Court has stated that the deprivation of the right to use and obtain a profit from property, although relevant, was not in every case independently sufficient to establish a takings claim. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982). *See also* Hooker v. Burr, 194 U.S. 415, 419 (1904) (stating claimant's abstract rights are unimportant if claimant is not injured to extent of penny).

use of intangible property.[30]

II. *PHILLIPS V. WASHINGTON LEGAL FOUNDATION*

A. *Opinion of the Court*

In *Phillips v. Washington Legal Foundation*,[31] the United States Supreme Court addressed the issue of whether the interest earned on client funds held in IOLTA accounts was the "private property" of the client for purposes of the Takings Clause.[32] The Supreme Court acknowledged that the existence of a property interest was determined by reference to substantive law or mutual understandings originating in an independent source, such as state law.[33] The Court noted that Texas applied the general rule that "interest follows principal."[34] Although there may be state legislation authorizing otherwise, the *Phillips* Court held that, at least as to confiscatory regulations, a state cannot evade the Takings Clause by renouncing traditional property interests well-settled under state law.[35]

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[30] *Massachusetts Bar*, 993 F.2d at 974. The court stated that only cases that established the right to exclude in relation to real property supported plaintiffs' claim. *Id.* However, the court noted the Takings Clause, to some extent, protected intangible rights. *Id.* at 973. *See also* Hodel v. Irving, 481 U.S. 704, 715 (1987) (stating right to pass on valuable property to one's heirs is itself valuable right); Ruckelshaus v. Monsanto, 467 U.S. 986, 1003-04 (1984) (stating trade secret is recognized property interest); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (finding one of essential sticks in bundle of property rights is right to exclude others).

[31] 118 S. Ct. 1925 (1998).

[32] *Phillips*, 118 S. Ct. at 1928. The Court noted that the petitioners had not argued in their petition for certiorari that it was error for the Fifth Circuit to address the property question alone. *Id.* Therefore, the Court concluded it would have been improper to address the takings and just compensation questions. *Id.* at 1930 n.4.

[33] *Id.* at 1930. The Court stated that because the Constitution does not create property interests, "existing rules or understandings that stem from an independent source such as state law" determined the existence of a property interest. *Id.* (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). The Court also noted that it was undisputed that the principal held in IOLTA accounts was the "private property" of the client. *Id.*

[34] *Id.* The Court reasoned that Texas, along with many other states, followed the "interest follows principal" rule, and that state law applied. *Id.* at 1930-31.

[35] *Id.* at 1931. The Court found traditional property interests existed despite a

The Supreme Court agreed that the government had great latitude in regulating how interest may be earned.[36] However, the Court stated that regardless of whether the owner had a constitutionally-recognized interest in the anticipated generation of interest by his funds, any interest that did accrue attached as a property right incident to the ownership of the initial principal amount.[37] Finally, the Supreme Court concluded that although interest earned on funds held in IOLTA accounts may have "no economically realizable value" to the client, "its possession, control, and disposition are nonetheless valuable rights."[38]

B. Dissenting Opinions

1. Justice Souter's Dissent

Justice Souter wrote a dissenting opinion and argued that the Court should have vacated the judgment of the court of appeals to avoid making an abstract ruling of the property interest question.[39] Justice Souter analyzed the elements of a

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state's legislative attempts to do away with them. *Id.* The Court also stated IOLTA programs are not another exception to the general rule that "interest follows principal" because, unlike other exceptions, IOLTA rules relied on no background principals of property law. *Id.* at 1932.

[36] *Id.* The Court reasoned that although state law regulated interest, the issue in this case involved not whether the law allowed such interest earnings, but rather, to whom such interest belonged. *Id.*

[37] *Id.* The Court determined that even though the property right to anticipated gains was less compelling than other property rights, once the state authorized the accrual of interest, the gains were no longer anticipated and belonged to the owner of the principal. *Id.*

[38] *Id.* at 1933. The Court reasoned that the key was not that the client funds held in IOLTA accounts could not have generated any interest at all, but that they could not have generated net interest. *Id.* at 1932-33. The Court concluded that property was more than economic value. *Id.* at 1933. The Court also noted that respondents' funds, not the state, created value. *Id.*

[39] *Id.* at 1934 (Souter, J., dissenting). Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, argued that the Court's ruling was an abstract proposition that may have no significance on the real issue, which was the takings claim. *Id.* (Souter, J., dissenting). Justice Souter reasoned that if the respondent's property had not been taken, or that the just compensation for any such taking was zero, then recognizing a client's property right in the interest earned would be useless and inconsequential. *Id.* at 1935 (Souter, J., dissenting).

takings claim that were ignored by the majority and concluded that the takings and compensation issues posed serious problems for the respondents, and might be resolved against them.[40]

2. *Justice Breyer's Dissent*

Justice Breyer wrote a dissenting opinion in which he considered the property interest question and concluded that the majority should have relied on land valuation cases, where courts determined the value of what was taken by what the owner lost, not by what the taker gained.[41] Justice Breyer stated that these legal analogies pointed to the more accurate conclusion that because no interest could have been earned in the absence of IOLTA programs, the interest was not the client's "private property."[42]

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[40] *Id.* at 1937 (Souter, J., dissenting). Justice Souter concluded that the factors asserted in *Penn Central Transportation, Co. v. New York City*, 438 U.S. 104, 124 (1978), could be detrimental to the respondents' taking claim, since the respondents suffered no apparent economic impact and possessed no reasonable expectation of obtaining any net interest, and the interest generated by IOLTA programs served the public interest. *Id.* at 1936 (Souter, J., dissenting). Justice Souter also stated that the client's inability to earn net interest outside IOLTA raised serious questions about entitlement to any compensation, as courts generally measure compensation by a claimant's loss, not by the government's gain. *Id.* (Souter, J., dissenting). Justice Souter noted that if the property interest question must be considered in the abstract, he would have answered it as Justice Breyer did in a separate dissenting opinion. *Id.* at 1937 (Souter, J., dissenting).

[41] *Id.* at 1939 (Breyer, J., dissenting). Before making his arguments, Justice Breyer agreed with Justice Souter that it was wrong to consider the property interest in isolation. *Id.* (Breyer, J., dissenting). However, because the court of appeals did not consider the entire claim, Justice Breyer considered the question himself. *Id.* (Breyer, J., dissenting). Justice Breyer argued that the majority misplaced its reliance on the legal truism that "interest follows principle" and on the holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Id.* (Breyer, J., dissenting). Justice Breyer stated that federal law ensured that in the absence of IOLTA intervention, the client's principal would earn nothing, which is quite different than the principal in *Webb's* that could and would have earned interest without state intervention. *Id.* at 1938-39 (Breyer, J., dissenting). Justice Breyer also stated that land valuation cases more appropriately addressed the problem of interest earned on IOLTA accounts because courts excluded government intervention as an element of value. *Id.* (Breyer, J., dissenting).

[42] *Id.* at 1939 (Breyer, J., dissenting).

III. Discussion

In *Phillips v. Washington Legal Foundation*, the United States Supreme Court settled the issue of whether interest earned on IOLTA accounts is the property of the client.[43] However, the Court failed to resolve the ultimate issue of whether IOLTA programs constitute an unconstitutional taking in violation of the Fifth Amendment.[44] Because conventional takings analysis involves the resolution of not only whether the interest asserted is property, but also whether the government has taken the property and whether there has been a denial of just compensation for the taking, a more comprehensive holding would have avoided an abstract determination.[45] After a full resolution of the takings claim on remand, the takings and compensation issues will likely be resolved against the respondents, affirming the constitutionality of IOLTA programs.[46]

As the Court has effectively overruled many jurisdictions by declaring that clients have a property right in the interest earned on IOLTA accounts, the future of IOLTA programs across the country is suspect.[47] By shifting ownership of a nominal amount of interest to the client, and an enormously beneficial amount away from IOLTA programs, the Court has undermined the justification for IOLTA programs, so that, in the long run, the fate of the programs may be a moot point.[48] Consequently, as clients are legally forbidden such interest, the Court's attempt to shift the benefit away from IOLTA programs may only result in the interest benefiting no one.[49]

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[43] *See supra* note 5 and accompanying text. The Court recognized the split in jurisdictions over whether the interest income generated by funds held in IOLTA accounts is private property for purposes of the Fifth Amendment's Takings Clause, and answered this question in the affirmative. *See supra* note 5 and accompanying text.

[44] *See supra* note 39 and accompanying text. By leaving on remand the takings and just compensation issues, the Court's holding is only a piece of the larger puzzle that must be solved; that is, whether or not IOLTA programs are unconstitutional. *See supra* note 39 and accompanying text.

[45] *See supra* notes 39, 40 and accompanying text. By making the abstract determination that the interest is the property of the owner, the decision implies that IOLTA programs are unconstitutional, when in fact, the ultimate fate of IOLTA remains to be resolved. *See supra* notes 39, 40 and accompanying text.

[46] *See supra* notes 12, 25, 40 and accompanying text. The property interest issue is just one of the hurdles the respondents must cross in their constitutional challenge to IOLTA programs. *See supra* note 39 and accompanying text. The remaining hurdles, the takings and compensation issues, will prove to be more difficult for the respondents than the first. *See supra* notes 12, 25, 40 and accompanying text.

[47] *See supra* note 24 and accompanying text. Because IOLTA programs depend solely on the interest that, according to the United States Supreme Court, belongs

IV. CONCLUSION

The *Phillips* opinion represents the United States Supreme Court's attempt to resolve one aspect of the ongoing issue concerning the constitutionality of IOLTA programs. Although the Court decided that a property interest exists in the interest earned on funds in IOLTA accounts, the ultimate ramifications of the decision are yet to be realized.

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to the client, IOLTA programs' existence may no longer be justified. *See supra* note 24 and accompanying text.

[48] *See supra* notes 7, 24, 25 and accompanying text. States implemented IOLTA programs to create a benefit where none existed before and used this benefit for the public good. *See supra* notes 7, 24, 25 and accompanying text. Since the Court just dismantled IOLTA programs' entire basis for funding, the programs have no other sustenance for operation, even if the takings and compensation claims are ruled in the programs' favor. *See supra* notes 7, 24, 25 and accompanying text.

[49] *See supra* note 7 and accompanying text. Federal banking regulations ensure that the interest cannot benefit the client. *See supra* note 7 and accompanying text.